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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 293

ARMOUR AND COMPANY, PETITIONER,

vs.

THE ALTON RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 31, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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3 State of Illinois, } ss.
County of Cook. }

IN THE CIRCUIT COURT OF COOK COUNTY.

Armour and Company, a corporation, *Plaintiff,*
vs.
The Alton Railroad Company, a corporation, *et al.*, *Defendants.*
} In Chancery. No. .....

COMPLAINT.

Plaintiff, Armour and Company, an Illinois corporation (operating in its own name, and also under the trade name of Morris and Company), with principal office and place of business in the City of Chicago, County of Cook, and State of Illinois, by Chas. J. Faulkner, Jr., Paul E. Blanchard and Walter C. Kirk, its attorneys, complains of
The Alton Railroad Company,
The Atchison, Topeka and Santa Fe Railway Company,
The Baltimore and Ohio Railroad Company,
The Chesapeake and Ohio Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company,
Charles P. Megan, Trustee of Chicago and North Western Railway Company,
Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company,
H. R. Kurrie and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company,
Chicago Junction Railway,
The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway,
Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company,
The New York Central Railroad Company, as Lessee of

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company,
Chicago and Erie Railroad Company,
Grand Trunk Western Railroad Company,
Illinois Central Railroad Company,
The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company,
Minneapolis, St. Paul & Sault Ste. Marie Railway Company,
The New York Central Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
The Pennsylvania Railroad Company,
Pere Marquette Railway Company,
Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company,
and for grounds of said complaint respectfully shows:

1. That Plaintiff is, and for many years has been, engaged in the purchase and slaughter of ordinary livestock, and the processing and sale of meats derived therefrom, operating a packing plant for such purpose in the City of Chicago, Illinois, adjacent to the properties of The Union Stock Yard and Transit Company of Chicago (hereinafter for brevity called the Stock Yards Company), in the area commonly known as the Stock Yards District.

2. That each of the corporate defendants named herein now is and at all times named herein has been a railroad corporation. That on the 15th day of September, 1933 the defendant, Charles M. Thomson, was duly appointed, and qualified, as Trustee of the assets and properties of the Chicago and Eastern Illinois Railway Company. That on and after the 21st day of October, 1935 the defendant, Charles P. Megan, was duly appointed, and qualified, as Trustee of the Chicago and North Western Railway Company. That on the first day of December, 1935 the defendants, Patrick H. Joyce and Luther M. Walter, were duly appointed, and qualified, as Trustees of the property and assets of the Chicago Great Western Railroad Company. That on the 18th day of April, 1936, defendants H. R. Kurrie and Holman D. Pettibone were duly appointed, and qualified, as Trustees of the property of the Chicago, Indianapolis and Louisville Railway Company. That on the first day of January, 1936 the defendants, Henry A. Scandrett, Walter J. Cummings and George I. Haight, were duly appointed, and qualified, as Trustees of the property and assets of the Chicago, Milwaukee, St.

Paul and Pacific Railroad Company. That on the first day of December, 1933 the defendants, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, were duly appointed, and qualified, as Trustees of the property and assets of the Chicago, Rock Island and Pacific Railway Company. That prior to May 25, 1933 and at all times since said date, the defendants, Norman B. Pitcairn and Frank C. Nicodemus, Jr. (or their predecessors in office), were the duly appointed and qualified receivers of the properties and assets of the Wabash Railway Company.

That the said defendant railroad corporations and the said receivers at all times since May 25, 1933; and the defendant trustees at all times since the respective dates of their appointments and qualification as aforesaid, were, have been and now are engaged in the operation of a line or lines of railroad and in the transportation of property, including ordinary live stock, by rail, as common carriers for hire, from various points in the United States (including points in Illinois) to, and in the delivery of said property to consignees at, Union Stock Yards, Illinois, either alone or under joint arrangements with other common carriers by rail (on whose lines such live stock originated) under written contracts for such transportation. That each of said defendants was during the period of such operations, doing business in the County of Cook and State of Illinois.

5 That prior to the appointment of said Trustee defendants, and at all times on and after May 25, 1933, the railroad properties now operated by said trustee defendants were respectively operated by the corporations of whose properties the said Trustee defendants were made trustees aforesaid, but that plaintiff is unable to maintain this suit against said corporate defendants by reason of the prohibition of the respective federal courts appointing said Trustee defendants against the maintenance of any suit against said defendants for causes of action existing prior to the date of the appointment of said respective trustees. But plaintiff has filed, or will soon file, its claim alleging the same facts as are contained in this bill, against such corporate carriers, with the respective trustees, for damages suffered during such period by the respective breaches of contract of said corporate carriers made after May 25, 1933 up to the date of the appointment of said respective defendant Trustees.

3. As to all livestock originating at or shipped to Union Stock Yards, Illinois, via the lines of any and all

of the Defendants, each of said defendants (or, in the case of trustee or receiver defendants, their corporate predecessors) has used for many years, and still uses, a common depot or station at such point for the receiving, loading, unloading and delivering of ordinary livestock, which depot or station is located near the junction of 39th Street and Racine Avenue, in Chicago, Illinois, and which includes loading and unloading platforms, chutes, chute pens, alleys, and storage pens, and other facilities necessary to the shipment, receipt for shipment, or delivery of livestock transported by rail, all of which facilities are, and for many years have been, located adjacent to the rails used by each of Defendants' trains in reaching said Union Stock Yards, and from which facilities outbound livestock shipments are loaded, into which facilities inbound shipments of livestock are unloaded, and from which facilities delivery of such livestock, consigned to said station, is tendered to consignees, after such unloading.

4. The unloading platforms, chutes, chute pens, alleys, and storage pens referred to in the preceding paragraph as Defendants' common railroad depot or station, for many years have been, and now are owned and operated by, and located on the property of, the said Stock Yards Company.

For many years, the facilities of the Stock Yards Company, above described, have been designated and used by each of the Defendants as their station or depot, known as Union Stock Yards, in the City of Chicago, Illinois, for the delivery of livestock consigned to commission merchants, packers, and others buying, selling, or receiving livestock at, to or from Union Stock Yards, and the Defendants in connection with their transportation of livestock, have, for many years, continuously kept on file with the Interstate Commerce Commission, and with the Illinois Commerce Commission, their tariffs stating the rates charged from each point of origin on their respective lines (and on lines of connecting rail carriers), to their said station or depot at Union Stock Yards, Illinois, above described.

5. That each of said Defendants has for many years held itself out, and now holds itself out, to transport, as a common carrier, livestock originating at any point on its lines (or received from connecting lines), from such origin point or points to Union Stock Yards, Illi-

nois, at which Defendants maintain their common livestock depot and station, there to be delivered to e consignee named in the contract for the transportaon thereof; and that each of said Defendants does regurly transport, and during the period here involved has ntinuously and regularly transported such livestock at tes named in tariffs lawfully on file with the Interstate ommerce Commission or with the Illinois Commerce ommission, from such origins to Union Stock Yards, Illiis, and has for many years held itself out as being ady, able, and willing to deliver livestock to consignees ter shipment, or accept livestock for shipment, at and om a station or depot located at Union Stock Yards, inois.

6. The Union Stock Yards is, and since, to wit, Dember 30, 1921, has been, a public stockyard posted as ch by the Secretary of Agriculture pursuant to the prosions of Section 302 of the "Packers and Stockyards t, 1921," U. S. C. A. Title 7, Chapter 9, Section 202. long established custom and usage as to intrastate affic, and by express statute (Sec. 15 (5), Interstate ommerce Act) as to interstate traffic, railroads transrting livestock destined to or received at public stockrds are required to unload and deliver the same to the ipper, owner, or consignee, in suitable pens, without tra charge therefor. Pursuant to such requirement, the efendants, and each of them, have for many years had rangements with the Stock Yards Company, whereby id company would act and has acted and still acts as eir agent in receiving in cars, unloading from cars, and lding livestock, in its pens at Union Stock Yards, until livery thereof could be tendered to, or taken by the nsignees to whom such livestock was consigned at Union ock Yards.

7. That at no time herein involved have the Defendts, or any one of them, owned or operated, or do any of em now own or operate any pens, chutes, or other facilies necessary for the unloading, holding until tender of livery, and the delivery of livestock, or the receipt of estock for shipment, at Union Stock Yards, Illinois, but ting in concert, by some lease, agreement, or other arngement unknown to Plaintiff, have used and still use e platforms, pens, chutes, and other facilities of the ock Yards Company for such unloading and delivery, d receipt and loading of livestock at said Union Stock rds station. And each of said Defendants has hereto-

fore published, and now publishes in current tariffs, the consideration paid by it, to said Stock Yards Company for loading or unloading such livestock into or out of cars at said station.

8. For many years each of said Defendants, having undertaken to transport, unload, and deliver livestock in carloads, to consignees at said common depot or station, Union Stock Yards, Illinois, have transported same with their own respective engines and crews, to a railroad track immediately adjacent to the unloading platforms of the said Stock Yards Company, and have there each delivered possession of each shipment of said livestock, on track, in cars, to said Stock Yards Company, and engaged the said Stock Yards Company as agent, to unload such livestock from cars, and to otherwise complete each transportation contract of the respective Defendants, with regard to such livestock consigned to Union Stock Yards. That no
7 one of the Defendants, publishes, or has published or filed with the Interstate Commerce Commission, or with the Illinois Commerce Commission, at any time herein involved, any tariff or schedule naming any charge to be assessed against the shipment or against the owner or consignee thereof, for such unloading or delivery, or any charge whatever applicable to such shipments of livestock, save and except the published and filed transportation rates applicable to said shipments.

On the contrary, the said agent, the Stock Yards Company, publishes and files its tariffs with the Interstate Commerce Commission naming specific charges per car assessed by it for loading or unloading carload shipments, and each of said Defendants has also filed its tariffs with each of said Commissions, providing for the payment of said charges of said Stock Yards Company by each of said Defendants, on all shipments of livestock transported to said Union Stock Yards by it; all of said tariffs being currently in effect. And each of said defendants does in fact make such payment to the Stock Yards Company as to each shipment of livestock unloaded and delivered by said Stockyards Company as aforesaid.

9. That in the transaction of its business, Plaintiff has for many years frequently purchased, and still purchases, livestock at points of livestock production in various states of the United States, or at other public markets, and shipped the same, or caused the same to be shipped, from such points of orig n on line or lines of railroad operated by one or more of said Defendants (or on connecting

lines) consigned to itself (or to Morris & Company, a trade name under which the Plaintiff conducts a part of its business) at Union Stock Yards, Illinois, for delivery to it at said station.

10. That during the period May 25, 1933 to date, Plaintiff, on thousands of occasions, contracted in writing with each of said Defendants for the transportation of carload shipments of ordinary livestock from various and numerous points of origin in the United States, on the respective lines of said Defendants, or of their connections, and for delivery of such shipments to the Plaintiff, as consignee, at Union Stock Yards, Illinois.

11. That each such contract covering each such shipment transported to Union Stock Yards by each Defendant, was identical in terms and conditions, saving and excepting only the kind of animals, number of head, origin point, and other details identifying each such shipment. That under the provisions of such contract, Defendants, or one or more of them, in each case contracted and agreed to transport said livestock from the origin named in each such contract (or from its junction with connecting lines) to Union Stock Yards, Illinois, and there to deliver the same to the consignee named in each of such written contracts, a copy of the portions of said contract which are and were uniform, is hereto attached, marked "Exhibit A," and incorporated into this pleading as though fully set out in the body hereof.

12. That Plaintiff loaded each of such shipments on cars at the respective points of origin and delivered each of such shipments to the contracting originating carrier in cars, in good order and condition, and in all other respects fully performed all duties imposed upon it under each of such contracts. That Plaintiff paid to De-
8 fendants, and to each of them, all charges claimed by them for each transportation service rendered, upon any and all of said shipments, in accordance with the tariffs of said respective Defendants applicable to said shipments, as published and filed with the Interstate Commerce Commission, or with the Illinois Commerce Commission.

13. That by reason of the employment by the Defendants of the Stock Yards Company, as the common agent for each of the Defendants, and of the unloading thereof by the said Stock Yards Company in such capacity as aforesaid, all of Plaintiff's said livestock, shipped under and by virtue of each of said contracts, was, by each of

the Defendants, placed in the possession and control of the said Stock Yards Company, as each Defendant's agent, while each shipment of such livestock was still in cars on tracks adjacent to the said unloading pens and facilities of the said Stock Yards Company, and each shipment was unloaded from said cars by said Stock Yards Company over unloading platforms and through unloading chutes or pens, or into other pens owned and operated by said Stock Yards Company, all before any tender of delivery of any of such shipments was made to consignee, the Plaintiff, by said Defendants, or by their agent, the said Stock Yards Company, and before the transportation of any shipment of said livestock had been completed, or the written contract therefor had been fully performed by any such Defendant.

14. That after said Stock Yards Company had unloaded each shipment of said livestock, the said Stock Yards Company notified the Plaintiff in each case, as to each shipment, the number and location of the chutes or pens into which said livestock had been unloaded or removed, and where each such shipment could be found at the time such notification was given. That the Plaintiff had at no time prior to receipt of such notice, as to any of such shipments, exercised any dominion or control, or given any direction either to the Defendant transporting any such shipment, or to Defendants' agent, the said Stock Yards Company, as to the time or manner of unloading, the platform at which, or the chutes or pens through or into which the said livestock was to be unloaded, or held pending tender of delivery or in any way directed or controlled, or attempted to direct or control either the Defendants, or any of them, or the said Stock Yards Company, in respect to unloading, yarding, driving, or handling of any shipment of said livestock, nor had any tender of any of said shipments been theretofore made to Plaintiff, either by the Defendant who transported the same to Union Stock Yards, or by the Stock Yards Company.

15. That Plaintiff, for many years prior to May 25, 1933, had made similar shipments of livestock to itself at Union Stock Yards, Illinois as to which the said Union Stock Yards Company was authorized to accept or hold for Plaintiff, or store or drive to Plaintiff's packing plant as Plaintiff's agent, after the transportation thereof had been completed, and after the contract therefor had been completely performed by Defendants. Frequently, prior

to said date, the Plaintiff ordered such shipments, after delivery thereof by Defendants to Plaintiff, to be weighed or stored or driven by said Stock Yards Company, or demanded said Stock Yards Company to do and perform other services in no wise incident or necessary to the
9 transportation or delivery of said livestock, for all of which Plaintiff paid to said Stock Yards Company, over and above any transportation charges applicable thereto, its published charges named in its tariffs on file with the Secretary of Agriculture since December 30, 1921 for the additional services so performed at Plaintiff's special instance and request.

16. On May 9, 1933, Plaintiff notified each of the Defendants herein, and their agent, the Stock Yards Company, in writing, that on and after May 25, 1933, it would accept delivery of all shipments of livestock consigned to it, either at the unloading chutes or at such other point at which delivery of such livestock was tendered by Defendants or by their said agent; and would remove said livestock from the said point of delivery within a reasonable time after such delivery; and that on and after said date it would pay to Defendants, or their said agent, no charges on livestock so accepted and removed, save and except the charges lawfully applicable for the transportation thereof under said written contracts and tariffs, which said notices are heretofore attached, marked Exhibits "B" and "C" and incorporated into this pleading as though fully set out in the body thereof.

17. On May 10, 1933, the said agent, the Stock Yards Company, notified the Plaintiff in writing that it had received said notice, but that it would demand the payment of certain charges alleged to be due it, on all livestock consigned to Plaintiff at said station, Union Stock Yards, Illinois, and placed in possession of said Stock Yards Company by any or all of said Defendants, and that no one of the said Defendants owned or maintained any pens or other facilities at said station through which livestock unloaded by said Stock Yards Company could be delivered to Plaintiff without the payment of a charge over and above the rates and charges named in Defendants' tariffs for transportation; and that on and after May 25, 1933, the said agent would refuse to deliver any livestock of Plaintiff coming into its possession as carriers' agent, for unloading, to the Plaintiff unless and until the Plaintiff paid or promised to pay to said agent, the charges demanded by said agent, over and above all charges for

transportation in accordance with said written contracts, published by the several Defendants in their respective tariffs and schedules currently on file and in effect, which said notice is hereto attached, marked Exhibit D, and incorporated into this pleading as though fully set out in the body thereof.

18. Thereafter, on May 16, 1933, Plaintiff notified each of said Defendants of the aforesaid statements and demands of their said unloading and delivering agent, the Stock Yards Company, as stated in the said notice of May 10, 1933, by delivering a copy thereof to each of said Defendants, and notified each of said Defendants, and their agent, the Stock Yards Company, that on and after May 25, 1933 the said Stock Yards Company would have no authority, after unloading such livestock, to accept or receipt therefor in Plaintiff's name, or for its account; that any delivery of Plaintiff's livestock by any Defendant to the said Stock Yards Company (other than delivery as Defendants' unloading and delivering agent), would constitute a conversion of Plaintiff's property; and that any payment made by Plaintiff in order to gain possession of its property from said Stock Yards Company would be made under protest, for account of the Defendant who had placed the livestock in the possession of the Stock Yards Company, and in mitigation of damages, which said notice is hereto attached, marked Exhibit E, and incorporated into this pleading as though fully set out in the body thereof. And, at the same time, Plaintiff notified the said unloading agent of said carriers, viz., the Stock Yards Company, of its notification given each of said Defendants as aforesaid, and further notified said Stock Yards Company that on and after May 25, 1933, it would accept delivery of such livestock at the unloading chutes, or at any other point where tender thereof was made, and promptly remove from the premises of said agent, such livestock belonging to Plaintiff, transported to Union Stock Yards by each and every Defendant, and delivered to said agent for unloading; and that on and after said date, Plaintiff did not desire and would not accept, receive or pay for any service rendered to, or facilities used by said livestock, beyond the point at which it was ready and willing to accept such livestock, when and where tendered, and from which it was ready and willing to promptly remove such livestock from such point of delivery; and that on and after said date, the said agent, the Stock Yards Company, had no authority to accept, handle,

or receipt for such livestock as agent of the Plaintiff, which said notice is hereto attached, marked Exhibit F, and incorporated into this pleading as though fully set out in the body thereof.

19. That during all times and dates herein mentioned, each Defendant well knew that it owned or operated for its own account, no facilities into which shipments of livestock consigned to Plaintiff at said common station, Union Stock Yards, Illinois, could be unloaded, and from which such shipments of livestock could be tendered or delivered to Plaintiff; and each Defendant well knew that it could not fully perform any of said written contracts for the transportation of such shipments to Union Stock Yards, Illinois, and for delivery thereof to the Plaintiff at such station, for the consideration named in such contracts, save by use of the pens, platforms, chutes, and other facilities of its said agent at said station; and that on and after May 25, 1933, each Defendant well knew, before it delivered possession of said livestock to said Stock Yards Company for unloading from cars, that said Stock Yard Company would unload, hold and tender delivery of the same at a point which was accessible to Plaintiff only by crossing other property of the said Stock Yards Company and from which, after tender and acceptance of possession, no egress could be had by said Plaintiff with its said livestock, save by crossing other property of its said agent, the Stock Yards Company; and each Defendant well knew that its said agent, having received possession of said livestock before unloading, or tender of delivery, would make no tender of delivery to Plaintiff at any point save and except at a point accessible to Plaintiff only by crossing the property of the said agent, the Stock Yards Company; and each Defendant well knew that its said agent, to whom it had delivered each of said shipments for unloading would refuse to complete said transportation contract, or to tender delivery, or to deliver, or surrender possession of said livestock to the Plaintiff unless and until the said Plaintiff had paid, or promised to pay, a toll or charge for crossing the said premises of the said agent, the Stock Yards Company, and for driving its animals across
11 said premises after delivery; and each of said Defendants well knew that the payment of the sum so demanded by its said agent as a condition precedent to the surrender of the possession of said livestock to the Plaintiff was not a charge filed or published by any Defendant, or by the agent of any Defendant, with the Inter-

state Commerce Commission or the Illinois Commerce Commission for any service incident to or connected with the performance of any of said written transportation contracts; notwithstanding which the defendants, on May 25, 1933, refused and have since said date continuously refused to provide or establish by lease or otherwise at their said common station, Union Stock Yards, Illinois, any depot or platforms, pens, or facilities over and through which Plaintiff might accept delivery of, and from which Plaintiff might remove its said shipments, transported under said written contracts, without payment of any toll or charge other than the charges lawfully applicable to such transportation under such written contracts; and the Defendants wholly failed to make any arrangement with its said agent under and by virtue of which the Plaintiff might have free ingress to the point at which delivery of livestock was so tendered, and egress from the point of delivery thereof, to a public street or other point, off the premises of said Stock Yards Company, without being compelled to pay a toll or charge over and above the charges lawfully applicable to said transportation, and a charge not filed with the Interstate Commerce Commission or the Illinois Commerce Commission, and not lawfully applicable in connection with the transportation service specified in said written contracts.

20. That, since May 25, 1933, upon arrival of each and every shipment of livestock, made on each of said written contracts with each of said Defendants, consigned to Plaintiff at Union Stock Yards, Illinois, and delivered by each of said Defendants to the Stock Yards Company as aforesaid, Plaintiff has demanded delivery of the same from said Stock Yards Company as soon as said livestock has been unloaded, immediately after unloading. That delivery of each of said shipments was refused by said Stock Yards Company unless and until Plaintiff paid, or promised to pay to Defendants' unloading agent, the Stock Yards Company, the sums demanded by said agent as a condition precedent to the delivery thereof, all of which each of Defendants well knew and still knows.

21. That the sums so paid by Plaintiff under protest were demanded by and paid to said agent, the Stock Yards Company, in terms of cents per head of livestock delivered, and since May 25, 1933 have been so demanded and paid in differing amounts as to different species of livestock, to wit, cattle, calves, sheep and hogs, and in amounts changing and varying since May 25, 1933, as to

each species of livestock. That Plaintiff has been injured and damaged in a large sum of money by the concerted and repeated action of said Defendants, and of each of them, by reason of their repeated failure and refusal to deliver livestock transported by them for Plaintiff, under said written contracts, to Plaintiff at a point at the destination named therein at which Plaintiff could accept delivery of said livestock, and from which Plaintiff could promptly remove said livestock, all without the payment by the Plaintiff of any charge or demand save the rates and charges applicable to said shipments as published
12 and filed with the Interstate Commerce Commission or the Illinois Commerce Commission.

22. That in mitigation of damages, Plaintiff has paid to said unloading agent, the Stock Yards Company, under protest, the sums demanded by it per head of livestock as a condition precedent to the delivery to Plaintiff of each shipment of livestock, transported by each Defendant to Union Stock Yards, Illinois, consigned to Plaintiff, since May 25, 1933; and in each case, has demanded repayment of such sums from each of the respective Defendants which transported each of such shipments to Union Stock Yards, which demand each Defendant refused and has since continuously refused.

23. That the Defendants herein named at all times named herein constituted and still constitute all of the carriers by rail having lines traversing the livestock production areas within which Plaintiff purchases and from which Plaintiff ships or causes to be shipped, livestock to its order at Union Stock Yards, Illinois, so that Plaintiff in the conduct of its said business was and is compelled to use the transportation facilities of said Defendants for such shipments; that there has been and still is concert of action among all of said Defendants in that they all have adopted and used, and still use, the same form of livestock contract; have all joined and still join, in a single tariff in naming said rates to Union Stock Yards, Illinois; have all appointed the same common agent for the unloading of their cars at the Union Stock Yards in Chicago, namely, the Stock Yards Company; have all established and used a common depot or station at said point; and all use the same unloading chutes and pens as their station or depot for the delivery of livestock; and have all appointed the same agent empowered to collect, receive and receipt for all freight charges on all of said shipments; and all wrote Plaintiff verbatim letters in re-

sponse to Plaintiff's several protests regarding the lien or charge imposed on Plaintiff's livestock by Defendants' common agent, the Stock Yards Company.

24. That at no time herein involved has Plaintiff demanded from any Defendant, or from their agent, the Stock Yards Company, the right to use any specific pens, alleys, runways, overhead drives, or tunnels of Defendants' agent, the Stock Yards Company, in accepting delivery of or removing livestock from the point at which delivery thereof was tendered, to the packing plants of Plaintiff; but have sought only to be permitted to take possession of its shipments of livestock at the unloading pens used by the Defendants as their depot or station in the Union Stock Yards, Chicago, Illinois, or at whatever point therein tender of said livestock was made, and thence to remove said shipments of livestock to a public street, or to such other point, off the premises of said Stock Yards Company, as that company, or the Defendants, might designate, by whatever route or means of egress, as might from time to time be determined by the Defendants, or by their joint agent, the Stock Yards Company.

25. That the Plaintiff has not, since May 25, 1933, in connection with any one of its shipments covered by this complaint, demanded or required the use of any facility of said Stock Yards Company, or any service from said Stock Yards Company, save such as was incidental to the unloading, storage pending tender of delivery, tender
13 of delivery, and delivery to Plaintiff, ingress for Plaintiff to the point where delivery of such livestock was tendered, and egress as aforesaid for such livestock from such point of delivery, all of which Defendants are required by their contract of transportation and by law to provide for Plaintiff, as to each of such shipments.

26. Since May 25, 1933, Plaintiff has continuously insisted and demanded, and still demands of the Defendants, that they deliver its livestock to it at the depot or station designated in their respective tariffs, viz., Union Stock Yards, Illinois, without the imposition of any lien or charge (save and except the respective tariff rates for transportation) against said livestock by any Defendant or its agent, the Stock Yards Company, in all cases where Plaintiff was willing and able to promptly remove such livestock from the unloading pens, or from the point where delivery was first tendered, within a reasonable time after the unloading of same from the cars, but each Defendant has continuously refused and still refuses to

effect any such delivery of such livestock to Plaintiff at such station.

27. Notwithstanding the written notices and protest to the Defendants above referred to, and the further demands made upon the Defendants from time to time for the payment of the expense to which Plaintiff has unlawfully been put, as aforesaid, Plaintiff is informed and believes and therefore alleges that the Defendants have made no protest to said agent, nor have any of them made or attempted to make any different arrangements for the unloading or tender, or delivery of Plaintiff's livestock at the Union Stock Yards depot or station of the Defendants, but, each Defendant has seemingly, acquiesced in and ratified the acts of said common agent, in the respects aforesaid.

28. That because of the course of conduct hereinbefore set forth, the Defendants have severally breached the duty severally imposed upon them by law as common carriers of livestock for hire, to provide reasonably convenient accessible and safe unloading pens, at the said common depot or station, at which such livestock could be tendered to Plaintiff, and from which Plaintiff's livestock could be taken by Plaintiff within a reasonable time after unloading, or tender of delivery, without the imposition of any charges other than the transportation charges lawfully applicable under said written contracts, and without the imposition of other and additional charges which were never at any time contained in any tariff filed by said Defendants, or any of them with the Interstate or Illinois Commerce Commissions, or applicable to said shipment under the terms of any contract to which Plaintiff was a party. Also, by reason of such facts, Defendants have breached each of their several transportation contracts with the Plaintiff, in failing to afford to Plaintiff an opportunity of receiving its livestock and of removing the same with reasonable promptness from the unloading pens used by Defendants at Union Stock Yards, Chicago, Illinois, or from any point at which delivery thereof is tendered, which opportunity has in all cases been denied the Plaintiff unless and until it paid the said charges of Defendants' common agent, the Stock Yards Company, which
14 charges were neither published nor applicable as a transportation charge, or which Plaintiff had contracted to pay.

29. Plaintiff alleges that it is continuing to ship or cause to be shipped livestock to itself as consignee at said

Defendants' station, Union Stock Yards, Illinois, and will continue to ship such livestock for many years, that Defendants' refusal to effect delivery of such livestock is continuous and repeated and will be continued in the future, that each shipment of livestock, via the line of each Defendant, is made upon a separate written contract, and each breach thereof as to each such contract is a separate breach, giving rise to a separate cause of action at law, that Plaintiff is regularly entering into approximately one hundred and fifty of such contracts each and every week, and Defendants are each regularly, uniformly and habitually breaching each such contract as hereinbefore stated, and are each failing and refusing to effect a free delivery of the animals named in such contract. That the damage accruing to Plaintiff on each carload shipped, as hereinbefore alleged, ranges from $13.50 to $20.00 per car; that many of said contracts cover the movement of but a single car; and that unless each of Defendants be enjoined as hereinafter prayed Plaintiff will be compelled to bring suits containing in the aggregate more than one hundred and fifty counts each week against each of the said Defendants, many thereof for amounts approximating only $15.00 each; and that unless equitable relief be granted Plaintiff will be compelled to bring and maintain a great multiplicity of suits against each of the same individual defendants, all for the same breach of contracts indentical in their terms.

30. Plaintiff further alleges that six of the twenty-four lines of railroad here involved are now operated, and for some portion of the period since May 25, 1933 have been operated by defendant trustees; that Plaintiff has no knowledge of the manner in which responsibility was divided between the corporations and the said respective trustees as to shipments arriving at Union Stock Yards, Illinois, on or about the day said trustees assumed responsibility for the operation of the lines of railroad transporting its livestock to Union Stock Yards, Illinois, as aforesaid, so that, as to such shipments Plaintiff is unable to ascertain whether the corporate defendant, or the said trustee defendants, are responsible for the breach of contract made as to such shipments.

31. Plaintiff further alleges that since May 25, 1933, it has shipped or caused to be shipped to its own order at Union Stock Yards, Illinois, via the lines of Defendants in the aggregate more than ten million head of livestock, contained in approximately ninety thousand cars moving

upon approximately fifty thousand separate and distinct contracts identical in terms to the contract attached hereto as Exhibit A; that each of the defendants operating each of the twenty-four lines of railroad here involved, defendants, has committed the same breach of each of such contracts identical in terms executed by it or them, by delivery of each of said shipments to the same agent, at the same point, each well knowing in each instance that said agent would refuse to deliver said livestock to Plaintiff save upon payment of certain charges, not required to be made by Plaintiff under any provision of any of said contracts, or by any tariff on file with the Interstate or
15 Illinois Commerce Commission. That recovery of damages at law would require the bringing and maintenance of approximately fifty thousand separate causes of action, the issues of each of which would be identical, against twenty-four separate defendants.

32. That the charges paid by Plaintiff, in mitigation of damages as aforesaid, which Plaintiff here seeks to recover, were charges per head, applicable upon each of the said ten million head, in amounts which varied, as to different species during all the time elapsed since May 25, 1933, and which have changed from time to time, as to each species, during said period. That the mere computation of the amount paid by Plaintiff to gain possession of the livestock moving upon the many thousand of transportation contracts entered into with said twenty-four defendants, and the division of such amounts between corporate and trustee Defendants is so complex and intricate as to require that the court appoint a special master to make an accounting and computation of the moneys which the Plaintiff has paid to said Defendants' agent, the Stock Yards Company, under protest, in mitigation of damages, solely in order to gain possession of its said livestock at said Union Stock Yards, following transportation by said Defendants, and by each of them, and to determine the amount each of said Defendants should pay to Plaintiff as total damages resulting from the thousands of breaches of thousands of identical written contracts on account thereof.

33. Plaintiff says that its said claim is peculiarly one for equitable jurisdiction in that each of the thousands of bills of lading or livestock contracts made and entered into since May 25, 1933 between Plaintiff, and each and

all of the Defendants is identical in its terms, differing only in details as to number of head of livestock shipped, weight, rate, point of origin and like particulars. In each and every such written contract, the Defendant executing the same covenanted and agreed to transport livestock to the identical destination, viz., Union Stock Yards, Illinois, so that the rights, liabilities, powers, privileges and immunities created by each such contract are identical as to each shipment handled by each Defendant. That in the case of each contract with each Defendant, the livestock was delivered to the same agent at the same point for unloading; that regardless of which Defendant transported a shipment of livestock here involved. Plaintiff in all cases paid the freight charges thereon to the same person, as joint agent of all Defendants; and the claim asserted by Plaintiff against each Defendant under each of said fifty thousand identical contracts is identical, viz., a repeated failure to provide a place and facilities for free delivery to consignee of the livestock so transported. That each alleged breach of contract or duty imposed by law occurred at the same place and in the same manner. That Plaintiff's demand for delivery and possession in the first instance was made and directed to the same agent, and the refusal to deliver without the payment of charges over and above the transportation charges was made by the same agent, in the same language and under the same terms and conditions, and Plaintiff asserts as to each transaction with each Defendant the same rights, and alleges the same liability arising from the same conduct. No Defendant has denied liability to Plaintiff on any ground differing from the grounds asserted by every Defendant, and in response to the demands made, and
16 notices served upon the several Defendants in connection with the subject matter here involved, each Defendant responded or replied with the same letter couched in the same words. That the statutes of Illinois and of the United States applying to any one of said written contracts with any one of said Defendants, apply with equal force to every other contract with every other Defendant.

34. That the equitable remedy of mandatory injunction is necessary to require the Defendants to make delivery of Plaintiff's livestock to it at said common station, upon payment by Plaintiff of the published rates to that station.

Wherefore, Plaintiff prays:

1. For summons directed to the Defendants, and each of them, requiring them to appear and answer the charges herein;

2. That upon due hearing the court adjudge and decree that the Plaintiff is entitled to the delivery of livestock consigned to it at Union Stock Yards, Illinois, at the unloading pens of the Defendants in the Union Stock Yards, Chicago, Illinois, or at such other point as same may be tendered, upon Plaintiff paying, or making lawful arrangements to pay, the tariff rates and charges of the Defendants, applicable to such shipments, without the imposition of any charge or charges in addition thereto, and free from any lien or claim of the Stock Yards Company, or of any other person, firm or corporation;

3. That a mandatory injunction be entered requiring the Defendants, and each of them, under penalty of law, on and after a date to be fixed by this court, to provide suitable ingress for Plaintiff to the point at which delivery of such livestock is tendered, and proper and reasonable, egress for removal of its livestock from the unloading pens of the Defendants, or from such other point in said station where delivery may be tendered to Plaintiff, at the Union Stock Yards in Chicago, Illinois, without the payment of any charge or charges therefor, by Plaintiff, to the Stock Yards Company, or any other person, firm, or corporation, save and except the said rates for transportation of said livestock, lawfully applicable thereto.

4. That the court appoint a Special Master to audit and tabulate, and make an accounting of the moneys which the Plaintiff has paid and, pendente lite, will pay to the Stock Yards Company under protest, and in mitigation of damages, in order to gain possession of its property and to remove the same from the point at which said property was delivered to it, and to compute the portion thereof due from each defendant herein.

5. That when the total amount paid by the Plaintiff to the Stock Yards Company, under such circumstances on and after May 25, 1933 and up to the date of said decree, or of any injunction issued herein and the portion thereof due Plaintiff from each Defendant, has been ascertained, that a judgment be entered by this court against each of said Defendants in such amount as is shown to have been incurred with respect to shipments made via the lines of such Defendant, together with interest.

17 6. And for such other and further orders as to the court may seem proper in the premises.

Armour and Company,
Plaintiff,

By (Signed) W. S. Clithero,
Vice President.

(Signed) Charles J. Faulkner, Jr.,
(Signed) Paul E. Blanchard,
(Signed) Walter C. Kirk,
Attorneys for Plaintiff.

Office Address:
Armour Building,
Union Stock Yards,
Chicago, Illinois.
Tel.: Yards 4745.

State of Illinois, } ss.
County of Cook. }

W. S. Clithero, being first duly sworn on oath deposes and says that he is an officer, to wit, Vice President of the plaintiff in the above entitled action; that he has read the foregoing complaint by him subscribed and knows the contents thereof and that the same is true of his own knowledge, except as to those matters stated on information and belief and as to such matters he believes it to be true.

(Signed) W. S. Clithero.

Subscribed and sworn to before me this 19th day of May, A. D. 1938.

(Signed) J. A. Dorin,
Notary Public, Cook County, Illinois.

(Notarial Seal)
J. A. Dorin,
Notary Public.

My commission expires Mar. 11, 1939.

18 EXHIBIT A. Exhibit A.

(Blank form of contract used by all defendants herein in connection with each shipment of livestock involved herein.)

J-30M-4-37 F. C. 6-30 Form 176 Revised

(Uniform Live Stock Contract, adopted by Carriers in Official, Southern and Western Classification territories, March 15, 1922, as amended August 1, 1930.)

Uniform Live Stock Contract

This form of contract to be used for shipments of Live Stock and Wild Animals instead of Uniform Bill of Lading.

Duplicate Original.—Not Negotiable

(Name of Carrier) Railroad Company

..... Station, ..., 19.....

This Agreement, made this ..... day of ....., 19....., by and between the (Name of Carrier) ...., party of the first part, hereinafter called the carrier,* and ..... (Shipper's name) part..... of the second part, hereinafter called the shipper;

Whereas, The classifications and tariffs under which this agreement is made require that, for the purpose of applying the lawful rate of freight, the shipper must declare the shipment to be "Ordinary Live Stock," specifying the kind or kinds of animals, or if not "Ordinary Live Stock" he must declare the kind and value of each animal, space for such declaration being provided below:

Now, Therefore, This Agreement Witnesseth, That the carrier has received from the shipper, subject to the classifications and tariffs in effect on the date of issue of this agreement, the live stock described below, in apparent good order, except as noted, consigned and destined as indicated below, which the carrier agrees to carry to its usual place of delivery at said destination, if on its road or on its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier* of all or any of said live stock over all or any portion of said route to destination, and

as to each party at any time interested in all or any of said live stock, that every service to be performed and every liability incurred in connection with said shipment shall be subject to all the conditions, whether printed or written, herein contained, including the conditions on back hereof, and which are agreed to by the shipper and accepted for himself and his assigns.

Consigned to .....

Destination ....., State of ....., County of .....

Route .....

Car Initials and Numbers .....

.....

Ordinary Live Stock

Ordinary live stock means all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses. On shipments of ordinary live stock no declaration of value shall be made by the shipper, nor shall any values be entered on this bill of lading.

I (We) declare the shipment covered by this bill of lading to be ordinary live stock.

.....

Shipper.

Other Than Ordinary Live Stock

On shipments of live stock chiefly valuable for breeding, racing, show purposes, or other special uses different rates of freight are in effect dependent on the valuation placed thereon by the shipper; which valuation may be the basic value as stated in the classification, at which the lowest freight rate applies, or it may be any higher valuation up to actual value, in which event the freight rate will be higher by the amount prescribed in the tariffs or classifications. Such declared or agreed values shall be entered in the column provided therefor in this bill of lading, and in no event shall the carrier be liable for any amount in excess of such valuation.

I (We) declare the shipment covered by this bill of lading to be other than ordinary live stock, and of the value herein declared, or agreed upon, and entered.

.....

Shipper.

Note.—The shipper shall execute one of the above declarations. Upon refusal of a shipper of other than ordinary live stock to declare the values of said stock for entry in this bill of lading the shipment will not be accepted for transportation under this contract. In the event the shipment consists of both ordinary live stock and other than ordinary live stock, both of such declarations shall be executed, but values shall be declared and entered on only the other than ordinary live stock.

Number and Description of Animals	Shipper's Declared Value (If on live stock chiefly valuable for breeding, racing, show purposes, or other special uses)	Weight (Subject to correction.)	Rate of Freight	
			Per 100 pounds.	Per car

Subject to Section 3 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

.....

Signature of Consignor.

If charges are to be prepaid, write or stamp here, "To be prepaid."

.....

Acknowledgment to be used if freight is prepaid.

Received $....., to apply in prepayment of the charges on the live stock described hereon.

.....

Agent or Cashier.

Per .....

(The signature here acknowledges only the amount prepaid.)

Charges advanced, $.....

Witness my hand: .....,
Shipper.

By .....,
Shipper's Agent.

.....

.....,
Witness.

.....
(Name of Carrier)

By .....,
Agent.

*The word "carrier" is to be understood throughout this contract as including any person or corporation in possession of the live stock under the contract.

Contract Terms and Conditions

Sec. 1. (a) Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the live stock herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence.

(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death sustained by said live stock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens, or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay caused by stress of weath or damage to or obstruction of track or other causes beyond the carrier's control.

(c) In case of quarantine, the live stock may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch, or at nearest available point in carrier's judgment, and in any such case

carrier's responsibility shall cease when the property is so discharged, or the property may be returned by carriers at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to the property shall be borne by the owners of the property or be a lien thereon. In case a shipment is stopped in transit by quarantine, the carrier shall immediately give notice of such fact to the shipper or consignee. Except in the case of its negligence proximately contributing thereto, no carrier shall be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done under quarantine regulations or authorities, nor for detention, loss, or damage of any kind occasioned by quarantine laws or in the enforcement thereof; and the shipper shall hold the carrier harmless for any expense it may incur or damages it may be required to pay by reason thereof.

Sec. 2. (a) No carrier is bound to transport said live stock by any particular train or vessel or in time for any particular market, or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said live stock by any carrier or route between the point of shipment and the point of destination.

(b) In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the live stock as determined by the classification or tariffs upon which the rate is based, such lower value, plus freight charges, if paid, shall be the maximum amount to be recovered whether or not such loss or damage occurs from negligence.

(c) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accord-

ance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

Sec. 3. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this live stock contract until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of the contract that the carrier shall not make delivery without requiring payment of such charges, and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consigned to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original contract, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this Live Stock Contract, the freight charges must be paid upon the articles actually shipped.

Sec. 4. (a) The shipper at his own risk and expense shall load and unload the live stock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision. In case any person shall accompany the live stock in charge of same, he shall take care of, feed and water the live stock while being transported, whether delayed in transit or otherwise, and whenever such person shall open or close any door or opening in the car or cars, or the pens or compartments in the vessel, he shall see that the same are so closed and fastened as to prevent the escape therefrom of any of the live stock.

(b) When bedding or appliances of a character not generally in use in the transportation of live stock are required, they shall be furnished by the shipper at his own expense and he shall separate different kinds of stock when loaded in the same car by adequately strong partitions and such stock shall be at the risk of the shipper as to any damage resulting from the insufficiency or inadequacy of any such bedding, appliance, or partition.

(c) Before the live stock is removed from the possession of the carrier or mingled with other live stock the shipper, owner, consignee or agent thereof shall inform in writing the delivering carrier of any visible or manifest injury to the live stock.

Sec. 5. (a) If all or any part of said live stock is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be

liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances, whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the live stock herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, and assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence, such carrier shall not be responsible for any loss or damage to live stock if it be necessary or is usual to carry the same upon deck.

(d) General average shall be payable according to York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby, according to the law and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the live stock is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this uniform live stock contract.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 6. Any alteration, addition, or erasure in this contract which shall be made without an endorsement thereof hereon, signed by the agent of the carrier issuing this agreement, shall be without effect, and this agreement shall be enforceable according to its original tenor.

Separate Contract with Man or Men in Charge of Live Stock.

.....Station,.....19....

In consideration of the carriage of the undersigned upon a freight train or vessel in charge of the live stock mentioned in the within contract, whether with or without charge for such carriage, each one of the undersigned severally hereby voluntarily assumes all risk of accident or damage to his person or property, and hereby releases and discharges each and every carrier from every claim, liability, or demand of any kind for or on account of any personal injury or damage of any kind sustained by him, unless caused by the negligence of such carrier or any of its employees; and agrees that whenever he shall leave the caboose and pass over or along the cars or track he will do so at his own risk of personal injury, except where the negligence of the carrier proximately contributes thereto, and that no carrier shall be required to stop or start its train or caboose cars at or from the depot or platforms, or to furnish light for his accommodation or safety.

.....

.....

.....

.....

(Signature of man or men in charge.)

.....

Witness.

Spaces provided below must be filled in by conductors. Attendant should present contract to conductors for this purpose.

From..... To..... Date..... Train..... Conductor.....
From..... To..... Date..... Train..... Conductor.....
From..... To..... Date..... Train..... Conductor.....
From..... To..... Date..... Train..... Conductor.....
From..... To..... Date..... Train..... Conductor.....

Agents must insert car and waybill references in spaces provided below.

Initial	Number	W/B No.	Date

Initial	Number	W/B No.	Date

Exhibit B. 19

EXHIBIT B.

(Letter of Armour and Company to each Defendant named in Exhibit C, post.)

May 9, 1933

Dear Sir:

Numerous direct shipments of live stock are consigned via your line of railroad to Armour and Company or its subsidiaries at the Union Stock Yards, Chicago, Illinois. By direct shipments are meant shipments in which Armour and Company, or its subsidiaries, are shown as the consignees on the railroad billing at point of origin; which are not purchased on the property of the Union Stock Yard & Transit Company at Chicago; and as to which no use is made of Union Stock Yard & Transit Company services or facilities except such as is incident to the completion of the transportation contract.

When such shipments are delivered to Armour and Company or its subsidiaries through the facilities of the Union Stock Yard & Transit Company of Chicago, Armour and Company, up to this time, has been required to

pay not only the transportation rate of your railroad to Union Stock Yards, Chicago, Illinois, but in addition thereto, the yardage charge assessed by the Union Stock Yard & Transit Company of Chicago; regardless of the fact that Armour and Company's employees may have performed the entire service rendered subsequent to the unloading of the live stock.

Armour and Company is advised that the carriers have no legal right to effect such a delivery of live stock as results in requiring Armour and Company to pay yardage charges to the Union Stock Yard & Transit Company of Chicago on such direct shipments as to which no yardage service is desired or received. Armour and Company is prepared to accept such shipments at reasonable and proper delivery pens of the carrier at the Union Stock Yards and, within a reasonable time, to remove the live stock therefrom to its own plants without other use of the facilities of the Union Stock Yard & Transit Company of Chicago.

In order that Armour and Company and its subsidiaries may not further be subjected to said yardage charges of the Union Stock Yard & Transit Company upon such direct shipments, which it is advised are unlawful, this is to notify you that, on and after May 25, 1933 Armour and Company will be prepared to accept at such reasonable and proper delivery pens of the carriers at Union Stock Yards, Chicago, all shipments of live stock consigned direct to Armour and Company or its subsidiaries at Union Stock Yards, Chicago, Illinois and to remove the same within a reasonable time thereafter, and that on and after said date Armour and Company will refuse to pay to the carriers, or to the Union Stock Yard & Transit Company of Chicago, any yardage charge upon such shipments of live stock so delivered by the carriers and so accepted and removed by Armour and Company and its subsidiaries and its or their employees at and from such reasonable and proper delivery pens of the carriers at Union Stock Yards, Chicago.

Yours truly,

(Signed) F. W. Ellis

Vice President.

Exhibit C. 20

EXHIBIT C.

(Letter of Armour and Company to Stock Yards Company.)

May 9, 1933

Mr. A. G. Leonard, President,
Union Stock Yard & Transit Co. of Chicago,
Union Stock Yards, Chicago, Illinois.

Gentlemen,

Herewith please find copy of letter we have sent to the respective officers of the following common carrier corporations:

The Alton Railroad Company
The Atchison, Topeka & Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
The Chesapeake and Ohio Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago and Eastern Illinois Railway Company
Chicago and North Western Railway Company
Chicago, Great Western Railroad Company
Chicago, Indianapolis and Louisville Railway Company
Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee)
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
The Chicago, Rock Island and Pacific Railway Company
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company
Chicago and Erie Railroad Company
Grand Trunk Western Railroad Company
Illinois Central Railroad Company
The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee)
Minneapolis, St. Paul & Sault Ste. Marie Railway Company
The New York Central Railroad Company
The New York, Chicago and St. Louis Railroad Company
The Pennsylvania Railroad Company
Pere Marquette Railway Company
Wabash Railway Company (Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers)

Kindly accept this as official notice that on and after May 25th, 1933, we shall not pay yardage charges on direct shipments of live stock received or accepted by us in the manner outlined in said letter.

Yours truly,
(Signed) F. W. Ellis
Vice President.

21 EXHIBIT D. Exhibit D.

(Reply of Union Stockyards Co. to Armour and Company.)

May 10, 1933.

Mr. F. W. Ellis, Vice-President,
Armour and Company,
Union Stock Yards,
Chicago.

Dear Sir:

The Union Stock Yard and Transit Company of Chicago begs to acknowledge receipt of your favor of the ninth instant.

This Company also acknowledges receipt of what purports to be a copy of a letter sent by you to various railroad officials in Chicago and elsewhere, dated as of the same date.

On behalf of The Union Stock Yard and Transit Company of Chicago I beg to hereby formally advise you that the property of The Union Stock Yard and Transit Company of Chicago is its private property and that its tariffs are on file with properly constituted authorities.

So long as Armour and Company route or permit or cause to be routed their shipments of livestock to themselves at the yards of this Company, The Union Stock Yard and Transit Company of Chicago will insist on the payment of its yardage charges before such live stock is released.

We observe in your letter to the carriers that you say you are prepared to accept shipments at reasonable and proper delivery pens of the carriers at the Union Stock Yards.

You hereby are notified that the carriers to which your letter purports to be addressed do not own or control any facilities or property at the yards of this company which can be used either by consignees of live stock consigned to the yards of this Company or by the carriers,

for the delivery of live stock after unloading, without the payment of the yardage charges imposed by this company for the use thereof.

Until and unless your threat of not paying the tariff yardage charges of The Union Stock Yard and Transit Company of Chicago is withdrawn, or until and unless such charges are paid, this Company will not permit live stock consigned to you at its yards to be delivered to you or to your employees, on and after May 25, 1933.

Very truly yours,
The Union Stock Yard and Transit
Company of Chicago
(Signed) By Arthur G. Leonard
President.

Exhibit E. 22

EXHIBIT E.

(Letter of Armour and Company same railroads to whom letter of May 9th (supra) was transmitted.)

May 16, 1933

Dear Sir:

As a matter of information, we furnished the Union Stock Yards & Transit Company of Chicago, Illinois, a copy of our letter to you, dated May 9th, 1933, concerning shipments of live stock consigned to us at Union Stock Yards Station, Chicago, Illinois. Please take notice of the matters stated in its response to us, dated May 10th, 1933, copy of which is attached.

You are hereby notified that on and after May 25th, 1933, the Union Stock Yards & Transit Company of Chicago, Ill. has no authority, after unloading such live stock, as your agent, in accordance with its tariff, to thereafter accept, or receipt for such live stock for us, as our Agent, for our account, or in our name. On and after May 25, 1933, any delivery by your railroad of our live stock to the Union Stock Yard & Transit Company of Chicago, Illinois (other than delivery of such live stock to the Union Stock Yard & Transit Company of Chicago, Illinois as your agent for unloading and delivery to us) will constitute a conversion of our property. Any payment by us of yardage or other charges to the Union Stock Yard & Transit Company of Chicago, Illinois made to gain possession of such property on and

after said date will be under protest; will be for your account, and will be made purely in mitigation of damages.

For your information, the shipments referred to above, as well as those referred to in my letter of May 9th, 1933, are billed to Armour and Company as such, or operating under the trade name of Morris & Company.

Yours very trudy,

(Signed) F. W. Ellis,
Vice President.

23 EXHIBIT F. Exhibit F.

(Letter of Armour and Company to Union Stock Yards Company.)

May 16, 1933.

Mr. Arthur G. Leonard, President,
The Union Stock Yard and Transit
Company of Chicago,
Union Stock Yards, Chicago, Ill.

Dear Sir:

Receipt is acknowledged of yours of May 10th in response to ours of May 9th enclosing a copy of our letter of even date therewith to officials of various line haul carriers now publishing rates to, and making deliveries of live stock at, Union Stock Yards Station, Chicago, Ill. as described in their respective tariffs lawfully on file with the Interstate Commerce Commission.

We have passed the information contained in your letter on to each of the respective line haul carriers as per copy of letter attached hereto.

You are hereby advised that any and all live stock which on or after May 25th, 1933, may be delivered to you by said carriers as their agent for unloading (as provided in your tariff No. 5, I.C.C. No. 8) and for delivery to us as consignee in accordance with the respective contracts of carriage covering the same, will be accepted and received by us from said carriers, (or from you as their agent) and promptly removed from your premises after such acceptance and receipt.

You are further notified that as to such stock, we do not desire, and will not accept, receive or pay for any service or use of facilities beyond the unloading pens which you provide for the carriers as their agent.

You are further notified that on and after said date

you have no authority to accept, handle, or receipt for such live stock, after unloading, and until delivery to us, as our agent, on our behalf, in our name or for our account.

You are further advised that at the time such stock is delivered to you by said carriers as their agent, most of the said shipments will be interstate commerce and will continue to be in interstate commerce until said contracts of carriage are fully performed by delivery of the lading covered thereby to us, the consignee thereof. We will hold you strictly accountable for any interference therewith or for any delay in the prompt delivery thereof in accordance with said contracts for interstate carriage.

Any payments which may be made by us to you on and after May 25th, 1933, on such shipments will be made under protest, solely for the carriers account, and in mitigation of damages caused by the carriers failure to make delivery of said stock to us as required by their respective contracts of lading covering such shipments.

The foregoing notice applies to shipments billed to Armour and Company as such, or operating under the trade name of Morris & Company.

Yours very truly,
(Signed) F. W. Ellis,
Vice-President.

24 State of Illinois, } ss.
County of Cook. }

Removal Order.

IN THE CIRCUIT COURT OF COOK COUNTY.

Armour and Company, a corporation, *Plaintiff,*
vs.
The Alton Railroad Company, a Corporation, *et al.*, *Defendants.*

In Chancery.
No. 38-8417.

ORDER.

This Cause coming on to be heard upon the several petitions, and amendments thereto,

The Alton Railroad Company,

The Atchison, Topeka and Santa Fe Railway Company,

The Baltimore and Ohio Railroad Company,
The Chesapeake and Ohio Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company,
Charles P. Megan, Trustee of Chicago and North Western Railway Company,
Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee),
Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company,
H. R. Kurrie and Holman B. Pettibone, Trustees, Chicago, Indianapolis and Louisville Railway Company,
Norman B. Pitcarin and Frank C. Nicodemis, Jr., as Receivers of Wabash Railway Company, a corporation,
The Cleveland, Cincinnati and St. Louis Railway Company, (The New York Central Railroad Company, Lessee),
Chicago and Erie Railroad Company,
Grand Trunk Western Railroad Company,
Illinois Central Railroad Company,
The Michigan Central Railroad Company, (The New York Central Railroad Company, Lessee),
Minneapolis, St. Paul & Saulte Ste. Marie Railway Company,
The New York Central Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
The Pennsylvania Railroad Company,
Pere Marquette Railway Company,

defendants herein appearing specially and solely for the purpose of removing the above entitled cause to the District Court of the United States in and for the Northern District of Illinois, Eastern Division; and said defendants having presented to the court their several petitions, and amendments thereto, and bonds for the removal of said cause as aforesaid; and it appearing to the court that notice of the filing of said petitions, and amendments thereto, and bonds, has been served upon the attorneys for the plaintiff, and the court having read and accepted said petitions, and amendments, and having examined said bonds and being fully advised in the premises,

It Is Hereby Ordered that said bonds, and each of them, are hereby accepted and approved as good and sufficient, both as to form and as to surety.

It Is Further Ordered that this cause be and the same is hereby transferred to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It Is Further Ordered that the Clerk of this court do transmit to the District Court of the United States for the Northern District of Illinois a full and complete transcript of all papers and pleadings filed in this cause and of all orders entered and made of record herein.

Enter:

John Prystalski,
Judge.

Dated; July 14, 1938.

Filed Sept. 13, 1938.

26 And on, to wit, the 13th day of September, 1938, came the defendants, Patrick H. Joyce and Luther M. Walker, Trustees, etc., by their attorneys and filed in the Clerk's office of said Court their certain Motion To Dismiss Bill Of Complaint, in words and figures following, to wit:

27 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—16171) * *

MOTION TO DISMISS BILL OF COMPLAINT.

Now come Patrick H. Joyce and Luther M. Walter, as Trustees of the property of Chicago Great Western Railroad Company, defendants herein, by Bryce L. Hamilton, their solicitor, and move the court to dismiss the bill of complaint herein upon the following grounds:

1. The complaint herein puts in issue the questions of what constitutes the transportation and delivery of live stock by railroad in interstate and intrastate commerce to the Union Stock Yards at Chicago, Illinois, which is a public stockyard, and requires a determination of those questions before any other issue presented by said complaint can be determined or adjudicated. The questions of what constitutes such transportation and delivery are administrative questions, committed by federal and state law to the primary jurisdiction of the Interstate Commerce Commission and the Illinois Commerce Commission.

The complaint herein does not allege that there has been any determination by the Interstate Commerce Commission or the Illinois Commerce Commission of the ques-
28 tions of what constitutes the transportation and delivery of the shipments mentioned in said complaint, and in the absence of such determinations this court has no jurisdiction to determine said issues or to proceed further herein.

2. This court has no jurisdiction as to the subject matter of the complaint in so far as it relates to these defendants because they were improperly included in the order of removal entered by the Circuit Court of Cook County.

Wherefore, these defendants pray that the complaint be dismissed as to them.

Bryce L. Hamilton,
Solicitor for said Defendants.
1400—38 So. Dearborn Street,
Chicago, Illinois.

29 And on, to wit, the 26th day of August, 1938 came the Receivers, etc., Defendants, Norman B. Pitcairn and Frank C. Nicodemus, Jr., by their attorneys and filed in the Clerk's office of said Court their certain Motion to Dismiss Complaint in words and figures following, to wit: Filed Aug. 26, 1938.

30 In the District Court of the United States.
* * (Caption—16171) * *

MOTION OF THE DEFENDANTS, NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., AS RECEIVERS OF WABASH RAILWAY COMPANY, A CORPORATION, TO DISMISS THE COMPLAINT HEREIN.

Now come the Defendants, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, a Corporation, by Hay, Morton & Freytag, their attorneys, and move the Court to dismiss the complaint and each and every cause of action purported to be alleged therein, and in support of said motion show as follows:

I. The complaint herein puts in issue the questions

of what constitutes the transportation and delivery of livestock, by railroad in intrastate and interstate commerce to the Union Stock Yards at Chicago, Illinois, which is a public stock yard, and requires a determination of those questions before any other issue presented by said complaint can be determined or adjudicated. The questions of what constitutes such transportation and delivery are administrative questions, committed by state and federal law to the primary jurisdiction of the Interstate Commerce Commission and the Illinois Commerce Commission. The complaint herein does not allege that there has been any determination by the Illinois Commerce Commission or the Interstate Commerce Commission
31 of the questions of what constitutes the transportation and delivery of the shipments mentioned in said complaint, and in the absence of such determinations this Court has no jurisdiction to determine said issues or to proceed further herein.

2 The complaint shows on its face that this Court cannot entertain this suit since there has been no prior finding by the Interstate Commerce Commission as to the Plaintiff's damages.

3. The complaint shows that there is a defect and nonjoinder of parties necessary and indispensable to the maintenance and determination of this suit in that The Union Stock Yard and Transit Company of Chicago, a Corporation, has not been joined as a party.

4. It appears on the face of the complaint that it does not state a valid cause of action against these Defendants.

Wherefore these Defendants pray that the complaint and each and every purported cause of action therein alleged be dismissed as to them, and that said Defendants may be hence dismissed with their costs in this behalf incurred; and for such other and further relief as to this Court may seem just.

Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, a Corporation,

By Hay, Morton and Freytag,
Their Attorneys.

39 S. La Salle Street, Chicago, Ill.,
Franklin 1580.

32 And on, to wit, the 26th day of August, 1938, came the defendants, The Alton Railroad Co., et al., by their attorneys and filed in the Clerk's office of said Court their certain MOTION TO DISMISS COMPLAINT in words and figures following, to wit: Filed Aug. 26, 1938.

33 IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—16171) * *

Motion of Defendants The Alton Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Chicago, Burlington & Quincy Railroad Company, The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway Company, The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Chicago and Erie Railroad Company, Grand Trunk Western Railroad Company, Illinois Central Railroad Company, The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Pere Marquette Railway Company, and The Pennsylvania Railroad Company, to Dismiss the Complaint Herein.

Now come the defendants The Alton Railroad Company, a Corporation, The Atchison, Topeka and Santa Fe Railway Company, a Corporation, The Baltimore and Ohio Railroad Company, a Corporation, The Chesapeake and Ohio Railway Company, a Corporation, Chicago, Burlington & Quincy Railroad Company, a Corporation, The Chicago River and Indiana Railroad Company, a Corporation, as Lessee of Chicago Junction Railway Company, The New York Central Railroad Company, a Corporation, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Chicago and Erie Railroad Company, a Corporation, Grand Trunk Western Railroad Company, a
34 Corporation, Illinois Central Railroad Company, a Corporation, The New York Central Railroad Company, a Corporation, as Lessee of The Michigan Central Railroad Company, The New York Central Railroad Company, a Corporation, The New York, Chicago and St. Louis Railroad Company, a Corporation, Pere Marquette Rail-

way Company, a Corporation, and The Pennsylvania Railroad Company, a corporation, by Sidley, McPherson, Austin & Burgess, their attorneys, and move the Court to dismiss the complaint and each and every cause of action purported to be alleged therein, and in support of said motion show as follows:

(1) This Court has no jurisdiction over the subject matter of this suit because the complaint shows on its face that said suit was commenced in the Circuit Court of Cook County, Illinois; said Circuit Court of Cook County, Illinois, does not have and has never had jurisdiction of any cause of action or claim alleged in said suit upon which relief can be granted; and the want of jurisdiction thus created is not affected by removal of said suit to this Court.

(2) The complaint shows on its face that this Court cannot entertain this suit since there has been no prior finding by the Interstate Commerce Commission as to the plaintiff's damages.

(3) The complaint shows that there is a defect and nonjoinder of parties necessary and indispensable to the maintenance and determination of this suit in that The Union Stock Yard and Transit Company of Chicago, a Corporation, has not been joined as a party.

(4) It appears on the face of the complaint that it
35 does not state a valid cause of action or claim upon which relief can be granted, against these defendants or any of them.

Wherefore these defendants pray that the complaint and each and every purported cause of action therein alleged be dismissed as to them, and as to each of them, and that said defendants may be hence dismissed with there respective costs in this behalf incurred; and for such other and further relief as to this Court may seem just.

The Alton Railroad Company,
The Atchison, Topeka and Santa Fe Railway Company,
The Baltimore and Ohio Railroad Company,
The Chesapeake and Ohio Railway Company,
Chicago, Burlington & Quincy Railroad Company,
The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway Company,
The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company,
Chicago and Erie Railroad Company,
Grand Trunk Western Railroad Company,
Illinois Central Railroad Company,

The New York Central Railroad Company, as Lessee of
The Michigan Central Railroad Company,
The New York Central Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
Pere Marquette Railway Company, and
The Pennsylvania Railroad Company,
Defendants to the above entitled cause,
By Sidley McPherson,
Austin & Burgess,
Their Attorneys.

Sidley, McPherson, Austin & Burgess,
11 So. La Salle St., Chicago, Ill.,
State 5400.
August 26, 1938.

36 And on, to wit, the 27th day of August, 1938 came the defendants H. R. Kurrie and Holman D. Pettibone, Trustees Etc., by their attorneys and filed in the Clerk's office of said Court their certain Motion to Dismiss in words and figures following, to wit: Filed Aug. 27, 1938.

37 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—16171) * *

MOTION TO DISMISS BILL OF COMPLAINT.

Now come H. R. Kurrie and Holman D. Pettibone, as Trustees of Chicago, Indianapolis and Louisville Railway Company, defendants herein, by Frank H. Towner, their solicitor, and move to dismiss the bill of complaint herein upon the following ground:

The complaint herein puts in issue the questions of what constitutes the transportation and delivery of livestock, by railroad in intrastate and interstate commerce to the Union Stock Yards at Chicago, Illinois, which is a public stock yard, and requires a determination of those questions before any other issue presented by said complaint can be determined or adjudicated. The questions of what constitutes such transportation and delivery are administrative questions, committed by state and federal law to the primary jurisdiction of the Interstate Commerce Commission and the Illinois Commerce Commission. The complaint herein does not allege that there has been any determination by the Illinois Commerce Commission or the Inter-

state Commerce Commission of the questions of what
38 constitutes the transportation and delivery of the shipments mentioned in said complaint, and in the absence of such determinations this court has no jurisdiction to determine said issues or to proceed further herein.

Frank H. Towner,
Solicitor for said Defendants.

Entered May 31, 1939.

39 And afterwards, to wit, on the 31st day of May, 1939, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

40 IN THE DISTRICT COURT OF THE UNITED STATES.

Wednesday, May 31st, A. D. 1939.

Present: Hon. William H. Holly, District Judge.

* * (Caption—16171) * *

The Court having heretofore heard the arguments of counsel and being now fully advised in the premises, It Is Ordered that the defendants' motion to dismiss the above entitled cause be and the same is hereby sustained and it is therefore Ordered that this cause be and the same is hereby dismissed at Plaintiff's costs.

41 And on, to wit, the 31st day of May, 1939 there was filed in the Clerk's office of said Court a certain Memorandum of Judge William H. Holly, in words and figures following, to wit:

42 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—16171) * *

MEMORANDUM.

Armour and Company, an Illinois corporation, engaged in the purchase and slaughter of livestock, filed its complaint in the Circuit Court of Cook County against the Alton Railroad Company and various other railroad companies and trustees of railroad companies praying that the court decree that it is "entitled to delivery of livestock

consigned to it at the Union Stock Yards, Chicago, Illinois, at the unloading pens at the Union Stock Yards at Chicago, Illinois, or at such other point as the same may be tendered, upon plaintiff paying, or making lawful arrangement to pay, the tariff rates and charges of defendants applicable to such shipments without the imposition of any charge or charges in addition thereto, and free from any lien or claim of the Stock Yards Company or of any other person, firm or corporation"; "that a mandatory injunction be entered requiring the defendants, and
43 each of them, under penalty of the law, on and after a date to be fixed by this court, to provide suitable ingress for Plaintiff to a point at which such livestock is tendered and proper and reasonable egress for removal of its livestock from the unloading pens of the Defendants, or from such other point in said station where delivery may be tendered to plaintiff at the Union Stock Yards in Chicago, Illinois, without the payment of any charge or charges therefor by the Plaintiff to the Stock Yards Company, or any other person, firm or corporation, save and except the said rate for transportation for said livestock, lawfully applicable thereto," and for an accounting as to monies therefor paid by plaintiff to the Union Stock Yards Company for yardage and other charges.

Each of the defendants has filed a motion to dismiss. The corporate defendants set up as ground therefor that the questions raised by the complaint are questions over which the Interstate Commerce Commission and the Illinois Commerce Commission have primary jurisdiction, and until those questions have been decided by the Commission in favor of the plaintiff neither the State nor Federal Court may entertain the suit, and further, that there is a defect and non-joinder of a party indispensible to the suit in that the Union Stock Yards and Transit Company of Chicago has not been joined as a party. Further, the trustee defendants have moved to dismiss on the ground that the corporations which they represent are in the process of reorganization under Section 77 of the Bankruptcy Act; that leave has not been granted to plaintiff in those proceedings to bring this action and that the action may not be maintained without such leave having first been granted.

44 The facts as set forth in the complaint are as follows:

Plaintiff is engaged in the purchase and slaughter of livestock and the processing and sale of meats derived there-

from, operating a plant for such purpose in the City of Chicago, Illinois, adjacent to the properties of the Union Stock Yards and Transit Company (hereinafter referred to as the Stock Yards Company. Plaintiff purchases and ships to itself from points in Illinois and other States livestock which is shipped over the railroad lines of defendants consigned to a station of the defendants at the Union Stock Yards at Chicago. This is a joint station used by all of the defendants. It is not on land owned by defendants or any of them but is located on the private property of the Stock Yards Company. This station had been so used as such common depot or station for the receiving, loading, unloading and delivery of ordinary livestock and included loading and unloading platforms, chutes, chute pens, alleys and storage pens and other facilities necessary to the shipment, receipt for shipment or delivery of livestock transported by rail, all of which facilities are and for many years have been located adjacent to the rails used by each of the defendants' trains in reaching said Union Stock Yards and into which facilities inbound shipments of livestock are unloaded, and from which facilities delivery of such livestock consigned to said station is tendered to consignees after such unloading. The said unloading platforms, chutes, chute pens, alleys and storage pens at said station have been for many years and are now owned and operated by said Stock Yards Company. The Union Stock Yards Company is and has been since December 30, 1931, a public stockyard posted as such by the Secretary of Agriculture pursuant to the provisions of Section 302 of
45 the "Packers and Stockyards Act, 1921" U. S. C. A. Title 7, Chapter 9, Section 202, and the defendants have for many years had, and still have, an arrangement with the Stock Yard Company whereby said company would act and has acted and still acts as their agent in receiving cars, unloading from cars and holding livestock in its pens at the Union Stock Yards until delivery thereof could be tendered to or taken from said Stock Yards by the consignee.

For many years each of said defendants have transported livestock in car loads to said station with their own respective engines and crews to the railroad track immediately adjacent to the unloading platforms of the Stock Yard Company and have there delivered possession of such shipments on the track in cars to said Stock Yard Company and engaged the Stock Yard Company as their agent to unload such livestock from said cars and to other-

wise complete each transportation contract of the respective defendants with respect to livestock consigned to the Union Stock Yards and has paid the Stock Yards Company for such unloading and placing the livestock in pens.

Prior to May 25, 1933, plaintiff for many years has made shipments of livestock to itself at the Union Stock Yards Company which the Stock Yards Company was authorized to accept and hold for plaintiff or store or drive to plaintiff's packing plant as plaintiff's agent after the transportation thereof by unloading and placing in the pens had been completed.

But on May 9, 1933, plaintiff notified each of the defendants and the Stock Yards Company in writing that on and after May 25, 1933, it would accept delivery on all
shipments of livestock consigned to it either at the
46 unloading chutes or at such other point at which delivery of livestock was tendered by defendants and would remove the livestock from the point of delivery within a reasonable time after such delivery; and that on and after said date it would not pay the defendants or to the Stock Yards Company any charges on livestock accepted and removed by it save and except the charges lawfully applicable for the transportation thereof; that on May 10, 1933, the Stock Yards Company notified plaintiff in writing that it had received said notice but that it would demand the payment of certain yardage charges alleged to be due it on all livestock at said station and placed in possession of said Stock Yards Company by any or all defendants; that no one of the defendants owned or maintained any pens or other facilities at said station through which livestock unloaded by said Stock Yards Company could be delivered to plaintiff without payment of the charge over and above the rates and charges named in defendants' tariffs for transportation, and that on and after May 25, 1933, said Stock Yards Company would refuse to deliver to plaintiff livestock of plaintiff coming into the possession of it, the Stock Yards Company, as carriers' agent for unloading, unless and until plaintiff paid or promised to pay to the Stock Yards Company the charges demanded by said Stock Yards Company over and above all charges for transportation by defendants.

Thereafter on May 16, 1933, plaintiff notified each of the defendants of the demands of said Stock Yards Company,
and that on and after May 25, 1933, the Stock Yards
47 Company would not have authority, after unloading such livestock, to accept or receipt therefor in plain-

tiff's name or for its account; that any delivery of plaintiff's livestock by any defendant to the Stock Yards Company (other than delivery as defendants' unloading and delivery agent) would constitute a conversion of plaintiff's property and that any payment made by plaintiff in order to gain possession of its property from said Stock Yards Company would be made under protest for account of defendant who had placed the livestock in possession of the Stock Yards Company, and in mitigation of damages. At the same time plaintiff notified the Stock Yards Company that on and after May 25, 1933, it would accept delivery of such livestock at the unloading chutes or any other point where tender thereof was made and promptly remove the same from the premises of the Stock Yards Company and that on and after said date plaintiff did not desire and would not accept, receive or pay for any service rendered to, or facilities used by said Stock Yards beyond the point at which it was ready and willing to accept said livestock when and where tendered, and from which it was ready and willing to promptly remove such livestock from the point of delivery.

Each defendant well knew that it could not fully perform its contracts for the transportation of shipments of livestock to said Union Stock Yards, and for delivery thereof to the plaintiff at such station, save by use of the pens, platforms, chutes and other facilities of said Stock Yards Company and well knew before it delivered possession of said livestock to said Stock Yards Company for unloading from cars that said Stock Yards Company would unload, hold and tender delivery of the same at a point which
48 was accessible to plaintiff only by crossing other property of said Stock Yards Company and from which, after tender and acceptance of possession, no egress could be had by plaintiff with its livestock, except by crossing the property of said Stock Yards Company, and well knew that said Stock Yards Company would refuse to complete said transportation contract or surrender possession of said livestock to plaintiff unless and until the plaintiff had paid or promised to pay a toll or charge for crossing the premises of said Stock Yards Company and for driving its animals across said premises after delivery, notwithstanding which defendants, on May 25, 1933, refused, and have since said date continuously refused, to provide or establish at their common station, Union Stock Yards, Chicago, Illinois, any depot or platform, pens, and facilities over and through which plaintiff might accept delivery of,

and from which plaintiff might remove its said shipments, without payment of any toll or charge other than the charges lawfully applicable to the transportation of such livestock, and that the defendants wholly failed to make any arrangement with the Stock Yards Company by virtue of which plaintiff might have free ingress to the point at which the delivery of livestock was tendered and egress from the point of delivery thereof to a public street or other point off the premises of said Stock Yards Company without being compelled to pay a toll or charge over and above the lawful charges for transportation.

Since May 25, 1933, plaintiff has been compelled, in order to obtain delivery of livestock consigned to it and arriving at the Union Stock Yards Company over the lines of defendants to pay a charge made by the Stock Yards Company for keeping such livestock and for ingress to
49 and egress from the yards of said Stock Yards Company. The lines of the defendants, so it is stated in the complaint, constitute all the carriers by rail traversing the livestock production areas within which plaintiff purchases and ships or caused to be shipped livestock to its order at the Union Stock Yards, Chicago, Illinois. Plaintiff at no time has demanded from any defendant or the Stock Yards Company the right to use any specific pens, alleys, runways, overhead drives or tunnels of the Stock Yards Company in accepting delivery or removing livestock from the point at which delivery was tendered to the packing plants of plaintiff but sought only to be permitted to take possession of its shipments of livestock at the unloading point used by the defendants as their depot or station in said Union Stock Yards, or at whatever point therein tendered, and thence remove said shipments of livestock to a public street or to such other point off the premises of said Stock Yards Company as that company or the defendants might designate and by whatever route or means of egress might from time to time be determined by the defendants or the Stock Yards Company.

The gist of the controversy appears to be this: Plaintiff buys at various points in the country and ships to itself over the railroads of defendants livestock destined to the joint station of defendants at the Union Stock Yards, Chicago. Defendants have the duty, under the law of unloading the livestock in pens ready for delivery to the consignee. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 138. Defendants' station is not located on the property of the defendants or any of them, but on the private property of

the Union Stock Yards Company. The defendants employ the Union Stock Yards Company to perform for them the duty of unloading the livestock and putting it in pens, these pens being the property of the Stock Yards Company situated on the private property of that company. Prior to May 25, 1933, the Stock Yards Company stored in their pens the livestock consigned to plaintiff. The live stock was delivered to plaintiff by the Stock Yards Company when called for by plaintiff who paid the Stock Yards Company a charge referred to in the briefs as "Yardage". About ten days prior to the 25th of May, 1933, plaintiff notified the defendants and the Stock Yards Company that it did not desire the services of that company (other than the service of unloading and placing in pens the cost of which was included by defendants in the costs of transportation) and demanded that the defendants deliver the livestock to it and permit it to remove it from the Stock Yards without the payment of any charge in addition to the regular charge for transportation. The defendants refused to take any action other than to deliver the livestock in the pens in the Stock Yards, although they knew, as plaintiff alleges, that the Stock Yards Company would not permit plaintiff to remove its livestock without the payment of the charge for yardage. The Union Stock Yards Company replied simply that it would refuse to deliver the livestock to plaintiff unless and until plaintiff paid the yardage charge. Since May 25, 1933, plaintiff has paid the yardage under protest and under this complaint seeks to recover of the defendants the amounts it has been compelled to pay to the Stock Yards Company to obtain possession of its livestock. It also prays for a mandatory injunction as set out above. The matters for the court to determine are whether the questions presented are primarily for the Illinois and Interstate Commerce Commissions rather than for the court, and whether the Stock Yards Company is a necessary party. There is also the question whether this suit may be maintained against the trustee without first obtaining leave of the court or courts which appointed them.

First. If this were a suit to recover merely a charge for transportation in excess of the tariff rates approved by the Interstate Commerce Commission, plaintiff could maintain its action. *Great Northern Ry. Co. et al.* v. *Merchants Elevator Co.*, 259 U. S. 285. But in that case the court said:

"Whenever a rate, rule or practice is attacked as

unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function of being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

This case seems to me to come squarely within the rule there laid down. Here the defendants have made no charge in excess of the established rates. They have received no money other than that to which they were entitled for the carriage of the livestock. The stock was carried to the
52 station designated by the shipper. It was unloaded and placed in pens in the manner that had been customary for many years prior to May 25, 1933, and to which plaintiff assented prior to the giving of the notice mentioned in the complaint. Plaintiff has long known that the Union Stock Yards station of defendants was on the property of the Union Stock Yards and Transit Company. It knew that the livestock when taken from the cars was put in pens located on the property of and owned by the Stock Yards Company. It now demands that the livestock be delivered directly to it and that it be given the right of ingress to and egress from the property of the Stock Yards Company without being required to make payment to that

company. Its demand may be proper and reasonable, but that is a question of administration for the Interstate Commerce Commission and Illinois Commerce Commission. It may well be that if a railroad establishes its station upon private property it is bound to make such arrangements with the owners of the property that consignees of freight may, without payment of fee to the owner of the ground, have access to the station for the removal of the freight. Ordinarily, such service would be required.

But here we have a situation where for many years plaintiff and other shippers have consigned and are now consigning their stock to the Union Stock Yards station knowing that after the unloading of the stock and placing it in pens it could not be removed to their processing establishments without the use of the facilities owned by the Stock Yards Company. Whether there are other stations in Chicago of the defendants provided with facilities
53 for the delivery of livestock and which plaintiff might use does not appear of record. It is possible that the solution of the problem is to require the railroads to provide proper stations on their own property or adjacent to plaintiff's plant. *Covington Stock Yards Co.* v. *Keith, supra.* All these are questions for the Commerce Commissions of the State and Federal governments.[1]

Plaintiff urges the court to take jurisdiction of this case because under the doctrines of *Proctor & Gamble* v. *United States,* 225 U. S. 282, if it were to go to the Interstate Commerce Commission and be denied relief, no matter how erroneous the ruling of the Commission, plaintiff would have no right to appeal. Whatever fears the plaintiff may have had on this score would seem to have been set at rest, in my opinion, by the Supreme Court in *Rochester Telephone Corporation* v. *United States, et al.,* decided April 17, 1939, not yet officially reported.

This is a case for the Commerce Commissions and not for the court, and for that reason the complaint should be dismissed.

Second. Is the Union Stock Yards and Transit Company an dispensable party to this litigation? In my opinion it is. Plaintiff prays for a mandatory injunction compelling defendants to provide plaintiff suitable ingress to the yards of the Stock Yards Company, and egress from the

(1) *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; *Texas & Pac. Ry. Co.* v. *American Tie Co.,* 234 U. S. 133; *Loomis* v. *Lehigh Valley R. R. Co.;* 240 U. S. 43; *Midland Valley R. R. Co.* v. *Barkley,* 276 U. S. 482; *Adams* v. *Mills,* 286 U. S. 397

yards with its livestock without payment of any
54 charge. How the court, not having jurisdiction of the Stock Yards Company, could enforce such an order plaintiff does not explain. Because of the non-joinder of the Stock Yards Company the complaint should be dismissed.

Third. The trustee defendants, trustees of the various railroad corporations, appointed under the provisions of Section 77 of the Bankruptcy Act assert that plaintiff cannot maintain an action of this nature against them without leave of the courts that appointed them. Plaintiff relies on Section 66 of the Judicial Code (Title 28, Sec. 125 U. S. C. A.) I am of the opinion that the section relied upon does not authorize the maintenance of such an action as this. *Barton* v. *Barbour,* 104 U. S. 126, *Ex Parte Baldwin,* 291 U. S. 610, *Merryweather* v. *U. S.* 12 F. (2d) 407.

The motions of the defendants to dismiss the complaint will be sustained. An order will be entered accordingly May 31st, 1939.

William H. Holly,
Judge.

55 And on, to wit, the 12th day of July, 1939 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal in words and figures following, to wit: Filed July 12, 1939.

56 In the District Court of the United States.

* * (Caption—16171) * *

NOTICE OF APPEAL.

Notice is hereby given that Armour and Company, a corporation, plaintiff appellant in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the 7th Circuit from the final judgment of the court entered in this action on May 31, 1939, dismissing the complaint of the plaintiff appellant herein.

Chicago, Illinois, July 7th, 1939.

(Sgd.) Chas. J. Faulkner, Jr.,
(Sgd.) W. C. Kirk,
(Sgd.) Paul E. Blanchard,
Attorneys for Armour and Company, Plaintiff.

Office address: Armour Building.
Union Stock Yards,
Chicago, Illinois.
Telephone: Yards 4745.

Filed July 12, 1939.

57 And on, to wit, the 12th day of July, 1939 came the Plaintiff by their attorneys and filed in the Clerk's office of said Court their certain Bond on Appeal in words and figures following, to wit:

58 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—16171) * *

BOND ON APPEAL.

59 Know All Men By These Presents:

That we, Armour and Company, a corporation, as principal, and Maryland Casualty Company, a corporation, as surety, are held and firmly bound unto The Alton Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington & Quincy Railroad Company; Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company; H. R. Kurrie and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway; The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway; Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company; The New York Central Railroad Company; as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Chicago and Erie Railroad Company; Grand Trunk Western Railroad Company; Illinois Central Railroad Company; The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, in the full and just sum of Two Hundred and

Fifty Dollars to be paid to the said The Alton Rail-
60 road Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington & Quincy Railroad Company; Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company; H. R. Kurrie and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway; The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway; Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company; The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Chicago and Erie Railroad Company; Grand Trunk Western Railroad Company; Illinois Central Railroad Company; The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 28th day of June, in the year of our Lord one thousand nine hundred and thirty-nine.

61 Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, in a suit pending in said Court, between Armour and Company, plaintiff, and The Alton Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington & Quincy Railroad Company; Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company; Charles F. Megan, Trustee of Chicago and

North Western Railway Company; Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company; H. R. Kurrie and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway; The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway; Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company; The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Chicago and Erie Railroad Company; Grand Trunk Western Railroad Company; Illinois Central Railroad Company; The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, defendants, a decree was rendered against the said Armour and Company, and the said Armour and Company, having filed its notice of appeal to the
62 United States Circuit Court of Appeals for the Seventh Circuit in the Clerk's Office of the said District Court to reverse the decree of the aforesaid suit;

Now, the condition of the above obligation is such, that if the said Armour and Company shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fail to make its appeal good then the above obligation to be void; otherwise to remain in full force and virtue.

Armour and Company,
By J. B. Scott, (Sgd.)
(Seal) *Vice-President.*
Attest:
J. A. Brown, (Sgd.)
Asst. Secretary.

Maryland Casualty Company,
By J. A. Lemmen, Jr., (Sgd.)
(Seal) *Atty. in fact.*
Attest:
L. Buhway. (Sgd.)

Approved by: _____

_____

63 And on, to wit, the 12th day of July, 1939 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Statement of Points in words and figures following, to wit: Filed July 12, 1939.

64 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—16171)

STATEMENT OF POINTS.

1. The court erred in its statements of fact alleged and relief prayed for, in the complaint.

2. The court erred as a matter of law, in holding that a simple question of whether, under the facts alleged, Defendants had or had not performed their written contract as common carriers (and the duties imposed by common law, incident thereto), was a question of which the Interstate Commerce Commission had exclusive jurisdiction.

3. The court erred as a matter of law, in holding that Defendants' agent, the Union Stock Yards Company, was a necessary party to the case for the following reasons:

(1) No contract, express or implied, existed between Plaintiff and said Company.

(2) The use of no property or facility of said Company or no service by said Company, was required or demanded by the Plaintiff.

(3) No connection existed between said Company
65 and any shipment involved herein by reason of any act or demand of Plaintiff, but such connection as did exist, arose solely from Defendants' action in refusing to tender said property at any point at said railroad station, except at a point located on the private property of said Company. As a result, no obligation to pay for the use of said facilities or services existed, save on the part of Defendants who had engaged them without Plaintiff's consent, and against its will.

(4) Said Company had no connection with any transaction named in the Complaint, save as the employed agent of Defendants.

4. The court erred in failing to hold that Defendants' action, in willfully and deliberately delivering Plaintiff's property to a third person, against its will and contrary to

its directions, knowing that Plaintiff could never secure possession thereof from such person, save by payment of moneys it had not contracted to pay, for a service it did not need nor want, constituted an unwarranted and willful breach of Defendants' contracts of transportation, to Plaintiff's damage, in the amount paid to recover possession of its own property, and that the Interstate Commerce Commission had no jurisdiction of such question.

5. The court erred in holding that the cause of action stated in the complaint was not one permitted to be brought against the trustee and receiver Defendants without prior consent of the court or courts appointing such trustees or receivers, under Section 66 of the Judicial Code (Title 66 28, Sec. 125 U. S. C. A.). Specifically, the trustee and receiver Defendants referred to are:

Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company.

Charles P. Megan, Trustee of Chicago and North Western Railway Company.

Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company.

H. R. Kurrie and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company.

Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company.

Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company.

6. The court erred in failing to hold that the cause of action alleged in the complaint was essentially a mere "loss and damage" action, of which the Interstate Commerce Commission had no jurisdiction.

7. The court erred in dismissing the Plaintiff's complaint.

Paul E. Blanchard,
Of attorneys for Plaintiff.

67 And on, to wit, the 12th day of July, 1939 came the Parties by Their attorneys and filed in the Clerk's office of said Court their certain Stipulation as to Record in words and figures following, to wit: Filed July 12, 1939.

68 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—16171) * *

STIPULATION AS TO RECORD.

It is hereby stipulated and agreed by and between Paul E. Blanchard of attorneys for Plaintiff herein, Kenneth F. Burgess, D. Robert Thomas, Douglas F. Smith, Hay, Morton & Freytag, Frank H. Towner, Bryce L. Hamilton, collectively, attorneys for all the Defendants herein, that the following documents, now of record in the Office of the Clerk of the above entitled Court are designated as the parts, and all the parts of the record, and proceedings (there having been no evidence offered), to be included in the record on appeal.

1. The Complaint.
2. Order of removal to Federal Court.
3. Motion of defendants Patrick H. Joyce and Luther M. Walter, Trustees of the property of the Chicago Great Western Railroad Company, to dismiss the Complaint.
4. Motion of defendants Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of the Wabash Railway Company, a corporation, to dismiss the Complaint.
5. Motion of defendants The Alton Railroad Company;
The Atchison, Topeka and Santa Fe Railway Company;
The Baltimore and Ohio Railroad Company;
The Chesapeake and Ohio Railway Company;
Chicago, Burlington & Quincy Railroad Company;
Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company;
Charles P. Megan, Trustee of Chicago and North Western Railway Company;

69 The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway Company;
The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company;
Chicago and Erie Railroad Company;
Grand Trunk Western Railroad Company;

Illinois Central Railroad Company;

The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company;

The New York Central Railroad Company;

The New York, Chicago and St. Louis Railroad Company;

Pere Marquette Railway Company;

The Pennsylvania Railroad Company;

Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company;

Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company, to dismiss the Complaint.

6. Motion of defendants H. R. Kurrie and Holman D. Pettibone as Trustees of Chicago, Indianapolis and Louisville Railway Company, to dismiss the Complaint.

7. Opinion of the Court on motion to dismiss.

8. Order of the Court dismissing the Complaint.

9. Notice of Appeal.

10. Appeal Bond.

11. Plaintiff's Statement of Points relied upon.

12. This Stipulation designating portions of the record to be included in the record on appeal.

Chicago, Illinois, July 7th, 1939.

Paul E. Blanchard,
Of attorneys for Plaintiff.

Kenneth F. Burgess,
Douglas F. Smith,
D. Scott Thomas,
Hay, Morton & Freytag,
By Meyer Morton,
Frank H. Towner,
Bryce L. Hamilton,
Attorneys for Defendants.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. .....

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

vs.

THE ALTON RAILROAD COMPANY, A CORPORATION,
et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 7030

ARMOUR AND COMPANY, A CORPORATION,
Plaintiff-Appellant,

vs.

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Defendants-Appellees.

Counsel for Plaintiff-Appellant:
MR. CHARLES J. FAULKNER, JR.,
MR. W. C. KIRK,
MR. PAUL E. BLANCHARD.

Counsel for Defendants-Appellees:

U.S.C.C.A. 7
FILED
AUG 18 1939
FREDERICK G. CAMPBELL
CLERK

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED AUG. 1, 1939.
PRINTED RECORD.

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IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 7030

ARMOUR AND COMPANY, A CORPORATION,
Plaintiff-Appellant,

vs.

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Defendants-Appellees.

Counsel for Plaintiff-Appellant:
MR. CHARLES J. FAULKNER, JR.,
MR. W. C. KIRK,
MR. PAUL E. BLANCHARD.
Counsel for Defendants-Appellees:

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable William H. Holly, District Judge of the United States for the Northern District of Illinois on 31st day of May, in the year of our Lord one thousand nine hundred and thirty-nine, being one of the days of the regular May Term of said Court, begun Monday, the 1st day of May, and of our Independence the 163rd year. Placita.

Present:

Honorable William H. Holly.
William H. McDonnell, U. S. Marshal.
Hoyt King, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Armour and Company, a corporation,
Plaintiff,

vs.

The Alton Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Chicago, Burlington & Quincy Railroad Company, Charles M. Thomson, Trustee of Chicago Eastern Illinois Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company; H. R. Kurrie and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway; The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company; The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; The Chicago and Erie Railroad Company; Grand Trunk Western Railroad Company; Illinois Central Railroad Company; The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company; Minneapolis, St. Paul and Sault Ste. Marie Railway Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; Norman B. Pitcairn, Frank C. Nicodemus, Jr., and Walter Franklin, Receivers of Wabash Railway Company,
Defendants.

No. 16171.

Be It Remembered, that the above-entitled action was commenced by the filing of Transcript of Record from the Circuit Court of Cook County in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 29th day of July, 1938, of which the following Complaint and Order for Removal are portions thereof.

70 Northern District of Illinois, } ss.
Eastern Division: }

I, Hoyt King, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Præcipe filed in this Court in the cause entitled Armour and Company, a corporation *vs.* The Alton Railroad Company, *et al.*, No. 16171 as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 1st day of August, A. D. 1939.

Hoyt King,
Clerk.

(Seal)

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UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 63, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the eighteenth day of August, 1939, upon which the following entitled cause was heard and determined:

Armour and Company,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, *et al.*,
Defendants-Appellees,

No. 7030, October Term, 1939, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of June, A. D. 1940.

Kenneth J. Carrick,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the fourth day of October, in the year of our Lord one thousand nine hundred and thirty-eight, and of our Independence the one hundred and sixty-third.

Armour and Company,
Plaintiff-Appellant,
7030 *vs.*
The Alton Railroad Company, *et al.*,
Defendants-Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And, to-wit: On the first day of August, 1939, there was filed in the office of the Clerk of this Court, an appearance of Counsel for plaintiff-appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030, October Term, 1939.

Armour & Co.,

vs.

The Alton Railroad Co., *et al.*

The Clerk will enter my appearance as counsel for the Plaintiff-Appellant.

Chas. J. Faulkner, Jr.,
W. C. Kirk,
Paul E. Blanchard,
Armour Bldg., U. S. Yards,
Chicago, Ill.,
Phone Yards 4745.

Endorsed: Filed August 1, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the ninth day of September, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for defendants-appellees, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030, October Term, 1939.

Armour and Company, a corporation,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, a corporation, *et al.*,
Defendants-Appellees.

The Clerk will please enter the following appearances as counsel for the following appellees:

The Alton Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington & Quincy Railroad Company; The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway Company; The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Chicago and Erie Railroad Company; Grand Trunk Western Railroad Company; Illinois Central Railroad Company; The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Pere Marquette Railway Company, and The Pennsylvania Railroad Company; Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Com-

pany; and Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company.

Kenneth F. Burgess,
Douglas F. Smith,
D. Robert Thomas, Jr.,
11 South LaSalle Street,
Chicago, Illinois.

Endorsed: Filed September 9, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fourteenth day of September, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for defendants-appellees, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030, October Term, 1938.

Armour & Company, a corporation,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, a corporation, *et al.*,
Defendants-Appellees.

The Clerk will enter my appearance a scounsel for Patrick H. Joyce and Luther M. Walter, as Trustees of the property of Chicago Great Western R. R. Co.

Bryce L. Hamilton,
1400 First National Bank Bldg.,
Chicago, Illinois.

Endorsed: Filed September 14, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fourteenth day of September, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for defendant-appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030, October Term, 1938.

Armour & Company, a corporation,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, a corporation, *et al.*,
Defendants-Appellees.

The Clerk will enter my appearance as counsel for Holman D. Pettibone, as Trustee of the property of Chicago, Indianapolis & Louisville Ry. Co.

Frank H. Towner,
1400 First National Bank Bldg.
Chicago, Illinois.

Endorsed: Filed September 14, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-seventh day of September, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for defendants-appellees, which said appearance is in words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030. October Term, 1939.

Armour and Company, a Corporation,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, a Corporation, *et al.*,
Defendants-Appellees.

The Clerk will enter our appearance as counsel for the Defendants, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, a corporation.

Meyer Morton,
Elmer W. Freytag,
39 S. LaSalle Street, Chicago, Ill.

Endorsed: Filed September 27, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-fifth day of January, 1940, there was filed in the office of the Clerk of this Court, a supplemental stipulation as to the record, which said stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Armour and Company, a corporation,
Plaintiff-Appellant,
vs.
The Alton Railroad Company, a corporation, *et al.*,
Defendants-Appellees.
} No. 7030.

SUPPLEMENTAL STIPULATION AS TO RECORD.

It is hereby stipulated and agreed by and between Paul E. Blanchard, of attorneys for plaintiff-appellant herein, Hay, Morton & Freytag, Frank H. Towner, Bryce L. Hamilton, Kenneth F. Burgess, Douglas F. Smith, and D. Robert Thomas, collectively attorneys for all the defendants-appellees herein, that the following document, now of record in the office of the Clerk of the District Court of the United States, is designated as part of the record to be included in the record on appeal in this cause:

Special and limited appearance and motion of defendants Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company, Charles P. Megan, Trustee of Chicago and North Western Railway Company, Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company, to dismiss the complaint herein for want of jurisdiction over them or any of them.

Chicago, Illinois, January 24th, 1940.

Paul E. Blanchard,
Of Attorneys for Plaintiff-Appellant.
Hay, Morton & Freytag,
Frank H. Towner,
Bryce L. Hamilton,
Kenneth F. Burgess,
Douglas F. Smith,
D. Robert Thomas,
Attorneys for Defendants-Appellees.

Endorsed: Filed January 25, 1940. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the thirtieth day of January, 1940, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 30, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.

Armour and Company, *Plaintiff-appellant,* vs. The Alton Railroad Company, *et al.,* *Defendants-appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

7030

It is ordered that the stipulation of counsel, filed on January 28, 1940, providing that a certain special and limited appearance and motion be included in the record on appeal herein, be, and it is hereby, approved.

And afterwards, to-wit: On the thirtieth day of January, 1940, there was filed in the office of the Clerk of this Court, a special and limited appearance, etc., which said special and limited appearance is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Armour and Company, a corporation, *Plaintiff,* *vs.* The Alton Railroad Company, a Corporation, *et al.,* *Defendants.*	In Equity. No. 16171.

SPECIAL AND LIMITED APPEARANCE AND MOTION OF DEFENDANTS CHARLES M. THOMSON, TRUSTEE OF CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, CHARLES P. MEGAN, TRUSTEE OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, HENRY A. SCANDRETT, WALTER J. CUMMINGS, AND GEORGE I. HAIGHT, TRUSTEES OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, AND FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, TO DISMISS THE COMPLAINT HEREIN FOR WANT OF JURISDICTION OVER THEM OR ANY OF THEM.

Now come the defendants Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company, Charles P. Megan, Trustee of Chicago and North Western Railway Company, Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company, and appearing specially and for the sole and only purpose of making this motion, by Sidley, McPherson, Austin & Burgess, their attorneys, move the Court to dismiss the complaint and each and every cause of action purported to be alleged therein, and in support of said motion show as follows:

The complaint shows upon its face that this Court does not have jurisdiction over said defendants or any of them in that they and each of them are Trustees appointed under and pursuant to Section 77 of the Bankruptcy Act of the United States, as amended, and that the necessary authority or consent to institute or prosecute this suit has not been obtained.

Wherefore these defendants, appearing specially and for the sole and only purpose of making this motion, pray that the complaint and each and every purported cause of action therein alleged may be dismissed as to them, and as to each of them, and that said defendants and each of them may be hence dismissed with their costs in this behalf incurred; and for such other and further relief as to the Court may seem just.

Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company;
Charles P. Megan, Trustee of Chicago and North Western Railway Company;
Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and
Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company,
Defendants to the above entitled cause,
By Sidney, McPherson, Austin and Burgess,
Their Attorneys.

Sidley, McPherson, Austin & Burgess,
11 So. La Salle St., Chicago, Ill.
State 5400.
August 26, 1938.

Certified Copy.

United States of America, } ss.
Northern District of Illinois. }

I, Hoyt King, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy

of the original Special and Limited Appearance and motion of Defendants to dismiss the complaint for want of jurisdiction, filed August 26, 1938, in the case of Armour and Company, Plaintiff, *vs.* The Alton Railroad Company, Defendants, General No. 16171, In Equity, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago this 9th day of October, A. D. 1939.

Hoyt King,
Clerk.

(Seal)

By Edward E. Douglas,
Deputy Clerk.

Endorsed: Filed January 30, 1940. Frederick G. Campbell, Clerk.

And afterward, to-wit: On the eighth day of February, 1940, the following further proceedings were had and entered of record, to-wit:

Wednesday, February 8, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

	Armour and Company, *Plaintiff-appellant,*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
7030	*vs.*	
	The Alton Railroad Company, *et al.,* *Defendants-appellees.*	

Now this day comes the parties by their counsel and this cause comes on to be heard on the transcript of record and briefs of counsel and on oral argument by Mr. Paul E. Blanchard, counsel for appellant, and by Mr. Douglas F. Smith, counsel for appellees, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the fourth day of April, 1940, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030. OCTOBER TERM, 1939, JANUARY SESSION, 1940.

ARMOUR AND COMPANY,
Plaintiff-Appellant,
vs.
THE ALTON RAILROAD COMPANY, A Corporation, *et al.*,
Defendants-Appellees.

On Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

April 4, 1940.

Before SPARKS, TREANOR, and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This is an appeal from a judgment of the District Court dismissing a complaint filed by Armour and Company, an Illinois corporation, engaged in the purchase and slaughter of livestock. 27 F. Supp. 625. Armour commenced this suit in the Circuit Court of Cook County against the Alton Railroad and various other railroad companies, hereafter also referred to as the "carriers." On July 14, 1938, the suit was removed to the Federal Court and therein filed on July 29, 1938. The defendant carriers moved to dismiss the complaint, the District

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Matter stricken or printed in italics are changes in opinion pursuant to order of May 21, 1940.

Court entered a judgment of dismissal, and Armour appealed to this Court.[1]

Armour and Company operates a packing plant adjacent to the public stockyards which are located at 39th Street and Racine Avenue, Chicago. These yards (constructed in 1865) are owned and operated by the Union Stock Yard and Transit Company of Chicago, hereafter referred to as the "Yards Company." Armour buys livestock in Illinois and other states, ships by rail to itself at Union Stock Yards, Illinois (the railroad station named in the tariffs), and pays the line-haul rate specified therein. Livestock consigned to this station is delivered by the defendant carriers at their common livestock depot, the yards of the Yards Company.

Prior to 1865 livestock shipped to Chicago packers was delivered by the various carriers at different places in the city. These places were not equipped with facilities for delivering livestock in any great quantity. After 1865, by the common action of the carriers and by arrangement with the Yards Company, the yards of this company became the ~~*only*~~ *usual* place in Chicago at which livestock ~~*could ordinarily*~~ *was* be delivered. Down through the years these yards continued to be the common livestock depot of all the carriers, and delivery was *ordinarily* made there. In expressing the same thought the Supreme Court described the yards as the "terminals of the line-haul carriers." *Adams* v. *Mills*, 286 U. S. 397, 409. See also *I. C. C.* v. *C. B. and Q. R. R. Co.*, 186 U. S. 320.

Thus it came to pass that these yards—providing such facilities as loading and unloading platforms, chutes and alleys, unloading and holding pens, and other livestock conveniences—became the common livestock depot of the defendant carriers. The Yards Company in supplying its yards, performs there the transportation services which the carriers are under a duty to render. Serving in this capacity it is the agent of the carriers and a common car-

1. Some of the carriers are or were in the process of reorganization under Section 77 of the Bankruptcy Act, 11 U. S. C. Sec. 205, and are or were represented by receivers or trustees. These defendants moved to dismiss on the additional ground that Armour failed to obtain the consent of the Bankruptcy Courts to bring this suit against them.

In general the corporate defendants moved to dismiss on two grounds: (1). The complaint raised questions involving the exercise of administrative discretion, and hence the *Abilene* doctrine was applicable. 204 U. S. 426; (2). Armour failed to join the Union Stock Yard and Transit Company of Chicago, a corporation, as party defendant.

rier subject to the Interstate Commerce Act. 24 Stat. 379, as amended in 1920, 41 Stat. 474, 49 U. S. C. Secs. 1-41; *U. S.* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; *Union Stock Yard & Transit Co.* v. *U. S.*, 308 U. S. 213. That it is proper for the carriers to discharge their duty to deliver at the place of destination, in this way, is clear. *Warehouse Co.* v. *U. S.*, 283 U. S. 501, 506.

At the yards employees of the Yards Company unload the livestock into unloading pens located upon the company's property. For this service the company charges the *carriers* a certain rate which is filed with the Interstate Commerce Commission. Since this service is a rail transportation service, rendered by the carriers (through their agent, the Yards Company) for the shipper, the charge therefor is covered by the line-haul rate. *Adams* v. *Mills*, 286 U. S. 397. On the other hand, in addition to and separate from the rendition of rail transportation services, the Yards Company also performs specified stockyard services such as holding, feeding and storing. In rendering such a special service the company is subject to the Packers and Stockyards Act, and for such services charges the *packer* a certain rate which is filed with the Secretary of Agriculture. 42 Stat. 159, 7 U. S. C. Secs. 181 *et seq.*, 201 (b), 226.

It might be said that in the rendition of a transportation service the Yards Company acts as agent of the carriers, but that in the performance of a stockyard service it acts as agent of the packer. *Adams* v. *Mills, supra; Union Stock Yard & Transit Co.* v. *U. S., supra; Burton* v. *Wabash Ry. Co.*, 58 S. W. (2) (Mo.) 443, 447 It has also been said that "Stockyard services do not commence until unloading ends; they end when loading begins." *Denver Stock Yards* v. *U. S.*, 304 U. S. 470, 477. See also *Burton* case, *supra.*

For many years the Yards Company has collected a specified "yardage" fee for all livestock received in the yards, and this charge has been filed with the Secretary of Agriculture. From the complaint and the exhibits attached thereto, it appears that the yardage fee is a per capita charge on all livestock received at the yards. But it does not appear what the exact nature of the service is, for which the charge is assessed. Plaintiff reasons that the charge is necessarily imposed on the privilege of removing the livestock from the unloading pens. Defendants

leave the impression that the charge is levied for the rendition of a stockyard service.[2] In any event, until May 25, 1933, Armour paid this yardage charge without complaint.

In passing we add that the transportation of livestock by rail begins with its delivery to the carrier for loading at point of origin, and ends after unloading for delivery or tender to the consignee at the place of destination.[3] This was the rule at the common law. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 136. It is the rule under the Interstate Commerce Act. See *Union Stock Yard & Transit Co.* v. *U. S., supra.* No magic is needed to compel the thought that the mere privilege of immediate removal from the unloading pens, "a mere way out to the public highways," is incidental to and part of the delivery. *Atchison, Topeka & Santa Fe Railway Co.* v. *U. S.*, 295 U. S. 193, 201; See also dissent therein, p. 203.

On May 9, 1933, Armour notified the carriers and their agent, the Yards Company, that after May 25, it would

2. Armour alleges that after May 25, 1933 it did not use extra facilities or special yard conveniences, and that therefore the imposition of the yardage charge was necessarily made for removing the livestock from the unloading pens. As such, it would appear that the charge is for a transportation service.

An attached exhibit (Reply of Union Stockyards Co. to Armour and Company) indicates that the charge is for the use of the yards, and that it is filed with the proper administrative authorities. As such, it would appear that the charge is for a stockyards service.

It is certain that the collection of the yardage charge, made in connection with the use of the yards in effecting delivery of livestock, is a "long existing practice" whose roots lie buried in the history of the stockyards and their use as a common livestock depot of the carriers. *Atchison, T. & S. F. R. Co.* v. *U. S.*, 295 U. S. 193, 199. This charge is applied to all livestock received at the yards. Nor has it been material in the past whether the animals were taken by the consignee immediately from the unloading pens, or from there transferred to holding pens and later taken by the consignee. *Atchison Ry.* case, *supra*, p. 196.

History also tells another story, a story of shipper complaint of practices and abuses indulged in by carriers and Yards Company to the end that terminal charges be added to scheduled carrier rates. See dissent in *Atchison Ry.* Case, *supra*, pp. 206-207. See also f. n. 3.

3. The practice at the Chicago yards, for over fifty years, had been to unload livestock in unloading pens without charge to the consignee. *Adams* v. *Mills*, 286 U. S. 397, 410. This, however, was not the practice prior to 1920 in other public stockyards, *Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 295 U. S. 193, 198. Section 15 (5) of the Interstate Commerce Act, enacted in 1920, made the Chicago practice general throughout the United States. 41 Stat. 486, 49 U. S. C. Sec. 15 (5).

Section 15 (5) provides that at public stockyards transportation shall include delivery of inbound shipments into "suitable pens" without extra charge to the consignee. In 1932 the Supreme Court in *Adams* v. *Mills, supra*, declared that the transportation of livestock to the Chicago public stockyards shall include unloading without extra charge, at the same time

accept delivery at the unloading pens and remove the unloaded livestock within a reasonable time thereafter, but would not pay the yardage fee. On May 10 the Yards Company answered that it would insist on the payment as long as the yards were used as the livestock terminal of the carriers. On May 16, Armour notified the carriers of this answer, but collection of the charge continued. However, after May 25, 1933, Armour paid the charge under protest and later instituted the instant case.

Nature of Consignee's Action. In the instant case Armour is not complaining that the line-haul rate is unreasonable, nor for that matter that the yardage charge is unreasonable. In the last analysis of things, it is plain that Armour's claim is based on the theory that the yardage charge is levied on a service, compensation for which is already included in the line-haul rate. We know that as consignee of livestock shipments, plaintiff is entitled to possession of the animals upon the payment of the lawful charges. Therefore, if indeed the carriers through their

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leaving undisturbed the Yards Company's practice of making the yardage charge on all livestock received therein, *Atchison Ry.* case, *supra*, p. 199.

In the meantime, however, the packers had begun to contest the legality of the yardage charges before the Interstate Commerce Commission, and this case became known as the *Hygrade* or *Atchison Ry.* case. The Commission found that no services were rendered after unloading for which the carriers and the Yards Company may assess charges, in instances where delivery is taken at the unloading pens within a reasonable time. 195 I. C. C. 533. On the other hand, the Commission concluded that the yardage charge upon livestock transferred to holding pens was proper.

However, the Commission's order directing discontinuance of the yardage fee in instances where delivery was taken at the unloading pens was set aside, for lack of supporting evidence. *Hygrade* case, *supra*, 295 U. S. 193. The Court was impressed by the consignee's constant use of certain property of the Yards Company, namely, "a route via the overhead runway to the Hygrade plant," and concluded that there was no evidence that in removing the animals from the unloading pens, the consignee used only an egress to the city streets. However, the Court recognized that "Plainly there is an essential difference between the route from the unloading pens to consignee's plant and a mere way out to the public highways."

In this connection, it is material to quote briefly: "The Hygrade Company did not seek and the Commission did not grant relief upon the ground that the carriers failed to provide egress from the unloading pens in the public stockyards (at Chicago) to the city streets by means of which consignee's animals might be removed to its plant * * * Consignee * * * sought free use of the Yards Company's properties, including the overhead runway * * *." *Atchison Ry.* case, *supra*, p. 200. It is to be noted that in the instant case plaintiff has borne these words in mind.

In a recent opinion the Supreme Court said of the *Atchison* or *Hygrade* decision that "There the Commission's order * * * was set aside on the sole ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish." *Union Stock Yard & Transit Co.* v. *U. S.*, 308 U. S. 213.

corporate agent have exacted an unlawful charge, then the exaction is a tort.

In general Armour alleges that the duty to deliver includes access to and from the unloading pens for the immediate removal of the cattle; this duty was breached. In particular Armour alleges that the yardage charge was imposed in addition to the scheduled tariff rate for the bare privilege of removal: such a charge is unlawful. See f.n. 2 also. In this light the suit here is one for damages occasioned by an alleged overcharge, the amount of which equals the yardage charges collected. See *Adams* v. *Mills, supra; Atchison Ry.* case, *supra; U. S.* v. *I. C. C.*, 73 F. (2d) 948.

Armour contends that the complaint in question states a cause of action for damages occasioned by improper delivery. From this Armour reasons that the cause of action is not based upon any violation of the Interstate Commerce Act, and hence the Interstate Commerce Commission is without jurisdiction. We cannot agree with Armour's major premise. In the paragraphs above, regard was given to the substance of the transactions alleged in the complaint. For example, it is obvious that the instant case is not a mere "loss and damage" suit. It is not necessary to say more, except that the question at all times is one not of form but of actuality.

In substance the complaint states a claim based on overcharge, plainly a violation of the statute. Section 6 (7) reads as follows: "* * * nor shall any carrier charge or * * * collect * * * a greater * * * compensation for such transportation of * * * property, or for any service in connection therewith, between the points named in such tariffs than the rates * * * specified (therein) * * *." Ordinarily the Courts and the Commission have concurrent jurisdiction over claims based on overcharge; therefore the difference of opinion between Armour and us as to the nature of the cause of action alleged, does not necessarily dispose of the case adverse to Armour's interest. *Southern R. Co.* v. *Eichler*, 56 F. (2d) 1010; *Barrett* v. *Gimbel Bros.*, 226 F. 623, 631; *Kansas City So. Ry.* v. *Wolf*, 272 F. 681.

Primary Jurisdiction Doctrine. The carriers moved to dismiss chiefly on the ground that the complaint raised administrative problems and hence was subject to the primary jurisdiction of the administrative bodies. Armour

contends that the complaint raised strict legal issues and hence the case was subject to the exclusive jurisdiction of the courts.

Some situations require prior administrative adjudication; other situations permit original resort to the courts. It is said the answer depends upon "the character of the controverted question and the nature of the inquiry necessary for its solution." *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. The Supreme Court has pointed out the line of demarcation many times: the line lies between controversies *which involve issues of law and those* which involve issues essentially of fact or call for the exercise of administrative discretion. See *Great Northern Ry.* case, *supra*, p. 295. But the *Abilene* doctrine, the doctrine of primary jurisdiction, is still more easily stated than applied. *Texas and Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 264 U. S. 426.

Our great Chicago stockyards go back to 1865 for their origin, and soon thereafter the line-haul carriers began to use these yards as their common livestock depot. And at the same time there came into existence the tri-party relationship between carriers, shippers and Yards Company. That relation continued through the years but not without many disturbing conflicts, as the opinions of the Supreme Court graphically point out. This picture in perspective has been drawn for us, and it paints a story of shipper complaint of practices at the yards, some to the end that forbidden charges be imposed for carrier service. The story told, brings into bold relief the instant controversy between shipper and line-haul carriers and identifies it as its most recent chapter.

In this case the "character of the controverted question" is plain enough. The controversy involves a quarrel between carriers and customer, wherein the customer condemns as unlawful the yardage charge, for many years levied by the carriers in addition to the line-haul charge. Armour claims that the yardage charge is imposed upon a mere incidental terminal service, compensation for which is already included in the line-haul rate. The carriers insist that the charge is levied on a non-transportation or special yard service, or on a carrier service, compensation for which is not properly included in the line-haul rate. And history indicates that it is peculiar to the yards in question, a charge growing out of the practice of the car-

riers and the Yards Company by which the yards were made the common depot for the delivery of livestock consigned to Union Stock Yards, Illinois. See f.n. 2 and 3.

To solve this controversy it is necessary to determine what in actuality the service is that is being rendered, whether it is one which the rail carriers are bound to furnish, and whether it is already included in the line-haul rate. The inquiry necessarily compels recourse to certain facts, such as the history of the Chicago stockyards; the use of these yards as the carriers' usual place of delivery; the history of the yardage charge; the tri-party relation; and many other intricate facts of transportation incidental to rate-making.

Counsel for Armour finds comfort in the proposition that delivery at the place of destination includes a "mere way out to the public highways." The complaint alleges that no special yard services were requested, so he infers that whatever service is covered by the yardage charge is included in transportation. Then he concludes that as a matter of law the charge is included within the line-haul rate. We are not inclined to disagree with his proposition of law, but we fail to appreciate his inference and conclusion. As shown in the paragraph above, we are concerned here with questions that compel inquiry into the history, usages and actual conditions of operation at the stockyards. Our conclusion is that this case presents a controversy whose solution necessitates the exercise of administrative discretion, and therefore prior administrative resort is imperative.

That this case raises administrative problems, finds adequate support in such cases as *Adams* v. *Mills*, 286 U. S. 397; *Atchison, T. & S. F. R. Co.* v. *U. S.*, 295 U. S. 193; *St. Louis I. M. & S. R. Co.* v. *J. F. Hasty & Sons*, 255 U. S. 252; *I. C. C.* v. *Atchison, T. & S. F. R. Co.*, 234 U. S. 294, and *Aron* v. *Pennsylvania R. Co.*, 80 F. (2d) 100, cert. den. 298 U. S. 658. In the *Atchison Ry.* case, 295 U. S. 193, 195, 199, the Supreme Court described the collection of the yardage charge as a "long existing practice," and stated the case to be whether "the practice of the carriers and Yards Company in making the stockyards their depot for delivery of livestock pursuant to an arrangement by which the Yards Company imposes a yardage charge is an unjust and unreasonable practice." Further discussion will add little to what has already been said.

Stay Pending Administrative Determination. In a supplemental brief Armour also argues that if an administrative question was involved, the Trial Court should have suspended its consideration of the case, until after it had referred the question to the proper administrative bodies and they had properly passed upon it. Counsel relies on a recent opinion by the Supreme Court, where it was stated that "When it appeared in the course of litigation that an administrative problem * * * was involved, the court should have stayed its hand * * *. There should not be a dismissal, but * * * the cause should be held pending the conclusion of an appropriate administrative proceeding." *General American Tank Car Corp.* v. *El Dorado Term. Co.*, 308 U. S. 422.

In the *El Dorado Terminal* case, *supra*, the Supreme Court points for precedence to *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247. In the *Mitchell* case the primary jurisdiction point was not raised until some time after trial had started. The Court there said, p. 266, "But owing to the peculiar facts of this case, the unsettled state of the law at the time the suit was brought and the failure of the defendant to make the jurisdictional point *in limine* so that the plaintiff could then have presented its claims to the Commission * * * direction is given that the dismissal be stayed.". In the *El Dorado Terminal* case the primary jurisdiction point was not raised until after the trial on the merits.

In the instant case the primary jurisdiction point was urged *in limine*. Therefore, the reasons for staying the dismissal do not exist, and it cannot be said on the strength of the *El Dorado Terminal* case that the Trial Court erred in failing to hold this case pending administrative reference and adjudication. We conclude, therefore, that the circumstances here do not require an application of the stay rule as announced recently in the *El Dorado Terminal* case.

In the supplemental brief counsel for Armour also argues that the administrative finding in the *Hygrade* case, 195 I. C. C. 553, is a substitute for the prior administrative adjudication which we conclude is necessary in this case, and hence direct recourse may be had to the courts without again referring the same question to the Commission. It is true that the *Hygrade* case involved the same problem, and that ordinarily this argument would be cogent.

Unfortunately, we cannot entertain the argument advanced, for it is history that the *Hygrade* finding was reversed. ~~*for lack of supporting evidence.*~~ *Atchison Ry.* Case, 295 U. S. 193. See also *Union Stock Yard & Transit Co.* v. *U. S.*, 308 U. S. 213, for a restatement of the *Hygrade* decision.

Our conclusion that the primary jurisdiction doctrine of the *Abilene* case is applicable here, makes it unnecessary to rule on other matters raised on the appeal. See f.n. 1. The order of the District Court is affirmed. It is so ordered.

Endorsed: Filed April 4, 1940. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the fourth day of April, 1940, the following further proceedings were had and entered of record, to-wit:

Thursday, April 4, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Armour and Company, *Plaintiff-appellant,*		Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
7030 *vs.*		
The Alton Railroad Company, *et al.,* *Defendants-appellees.*		

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed with costs.

And afterwards, to-wit: On the nineteenth day of April, 1940, there was filed in the office of the Clerk of this Court a Petition of plaintiff-appellant for rehearing and motion for order remanding the cause to the lower Court for trial, and for a supplemental opinion, which said petition and motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Armour and Company, a Corporation, *Plaintiff-Appellant,* *vs.* The Alton Railroad Company, a Corporation, *et al.*, *Defendants-Appellees.*	On Appeal from the Order of Judge Holly, Entered in the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION OF PLAINTIFF-APPELLANT FOR REHEARING AND MOTION FOR ORDER REMANDING THE CAUSE TO THE LOWER COURT FOR TRIAL, AND FOR A SUPPLEMENTAL OPINION.

To the Honorable United States Circuit Court of Appeals for the Seventh Circuit, and to the Honorable Judges thereof:

Now comes the plaintiff-appellant, and respectfully petitions this Court for rehearing, and respectfully moves

(a) for an order remanding this cause to the lower Court for trial on the merits;

(b) for an order setting aside the order of this Court, affirming the decision of the lower court;

(c) for the issuance of a supplemental opinion passing upon the two grounds of appeal not considered by the Court in its opinion, and correcting and clarifying its opinion in one respect wherein it appears to contradict, or deny, at least by inference, facts alleged in the complaint; which facts are, on motion to dismiss, deemed admitted and true, and binding on the Court for the purposes of such motion.

In support of said motion, plaintiff respectfully shows:

1. That in the Court's prior opinion herein, it found

to be inherent in the cause presented, an administrative question, requiring prior consideration by the Interstate Commerce Commission. Since the said decision of this Court, the Interstate Commerce Commission has fully considered and decided, the very administrative question referred to by the Court. Such decision is attached hereto as an Appendix. As a result, the lower court may now hear the case on the merits, and decide the same, in the light of such administrative disposition.

2. Remand to the lower Court for such disposition cannot yet be had, due to the fact that the lower Court's decision was based, not solely upon the existence of the undecided administrative question referred to, but upon two additional procedural defects, viz.:

(1) Defect of parties defendant, arising from plaintiff's failure to join the Yards Company as defendant; and

(2) Lack of jurisdiction of the lower Court over certain of the trustee defendants, due to plaintiff's failure to secure leave of the appointing Court, to the maintenance of the suit.

3. The opinion of the Court does not reflect the facts alleged in the complaint, in that it fails to state that on May 16th, 1933, Armour instructed each of said defendants, in effect, not to deliver its inbound livestock shipments to the Stock Yards Company (the public stock yards), unless the defendants were willing to assume all added expense arising from such delivery, and notifying defendants that it would accept delivery at any other point selected by said defendants. Under the Commission's decision, the election of the shipper to use the Yards Company's facilities, is made a condition precedent to the existence of the very administrative question found to exist by this Court.

The Court seems to assume the contrary of these facts, and that Armour made some conscious election of the yards of that Company as its delivering point; or acquiesced in such use of the property of that Company. Yet the Court found (Footnote a, page 3), that the complaint alleged that Armour used no facilities of the Yards Company, except as a transportation facility. It considered the reply of the Yards Company to Armour, of date May 10th, 1933, but apparently overlooked Armour's counter-reply of date May 16th, 1933, and Armour's notice to the carriers, of the same date (Exhibits E and F to complaint, Transcript of Record pages 36-38), wherein Ar-

mour went as far as it legally could go, in preventing any use of the property or service of the Stock Yards Company.

We respectfully suggest that the opinion be clarified in this respect.

Dated at Chicago, Illinois, April 19th, 1940.

Respectfully submitted,
Chas. J. Faulkner, Jr.,
Walter C. Kirk,
Paul E. Blanchard,
Attorneys for Plaintiff-Appellant.

Endorsed: Filed April 19, 1940. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-first day of May, 1940, the following proceedings were had and entered of record, to-wit:

Tuesday, May 21, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

7030	Armour and Company, *Plaintiff-appellant,* *vs.* The Alton Railroad Company, *et al.,* *Defendants-appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the opinion of this Court filed in this cause on April 4, 1940, be, and it is hereby amended by making the following changes: On page 2, lines 16 and 17, the word "only" is changed to "usual", and the words "could ordinarily be" are changed to "was"; on page 2, line 19, the word "ordinarily" is inserted between the words "and delivery was" and the words "made there"; on page 4, in the 22nd line from the bottom of the footnotes, the words "for lack of supporting evidence" are deleted; on page 6, in the 6th line from the bottom, the words "which involve issues of law and those"

are inserted between the word "controversies" and the words "which involve"; and on page 9, in the 9th line from the bottom, the words "for lack of supporting evidence" are deleted.

And on the same day, to-wit: On the twenty-first day of May, 1940, the following further proceedings were had and entered of record, to-wit:

Tuesday, May 21, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Armour and Company, *Plaintiff-appellant,* vs. The Alton Railroad Company, *et al.,* *Defendants-appellees,*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

7030

It is ordered by the Court that leave be granted to plaintiff-appellant to file an additional memorandum instanter.

It is further ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby denied.

It is further ordered by the Court that the motion of plaintiff-appellant for an order remanding the cause to the lower Court for trial, and for a supplemental opinion be, and the same is hereby denied.

And on the same day, to-wit: On the twenty-first day of May, 1940, there was filed in the office of the Clerk of this Court an opinion on Petition for Rehearing, which said opinion is in words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7030. OCTOBER TERM, 1939, APRIL SESSION, 1940.

ARMOUR AND COMPANY, a Corporation, *Plaintiff-Appellant*, *vs.* THE ALTON RAILROAD COMPANY, a Corporation, *Defendants-Appellees.* } Appeal from the Order of the District Court of the United States for the Northern District of Illinois, Eastern Division.

May 21, 1940.

PETITION FOR REHEARING.

Before SPARKS, TREANOR and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* Armour's complaint and argument too was based on the theory that the particular yardage charge (imposed by the defendant railroads through their agent Yards Company) is levied on the bare privilege of removing the livestock from the unloading pens, a service already compensated for in the line-haul rate. The complaint and attached exhibits indicated that the livestock was consigned for delivery at Union Stock Yards, Illinois. Livestock consigned to this station is delivered by the defendant railroads at their common livestock depot (the public stock yards of the Yards Company) unless the consignee specifies delivery on industry tracks serving his plant or on team tracks of the individual railroads.

This court concluded that the District Court did not err in dismissing the complaint in question: it raised administrative problems and hence was subject to the primary jurisdiction of the administrative bodies. Since our decision the Interstate Commerce Commission has adjudi-

cated the administrative problems against Armour, *i. e.*, it has found that the transportation of livestock consigned for delivery at this common livestock depot ends at the unloading pens and that hence the carriers' failure to afford free egress is not an unreasonable practice.

In the course of the administrative opinion the Commission defined three possible factual situations involving the shipment of livestock. (1) Chicago shippers may consign livestock to themselves at the Union Stock Yards station, and if delivery is not requested as in (2) below, then delivery is at the public yards of the Yards Company. As to this situation the administrative finding is as stated in the preceding paragraph. (2) Chicago shippers may consign livestock to themselves at the Union Stock Yards station and specify delivery at team tracks or at industry tracks. As to team track delivery the consignee does his own unloading. As to industry track delivery he pays an additional switching charge. (3) Shippers may consign livestock to a station other than a public stock yard. As to this situation transportation does not end at the unloading pens and includes free egress therefrom to the public streets.

In this petition Armour contends that its case falls either in situation (2) or situation (3) and therefore our decision should be reversed. There is no merit in this contention. The complaint and exhibits are plain that Armour's case falls within the confines of situation (1) and the adverse administrative adjudication, unless disturbed in proper course, stands in Armour's way. In fact, to give heed to the contention here is tantamount to our giving Armour permission to alter or modify the true character of the complaint. This we can not do.

Plaintiff has asked leave to file an additional memorandum. Leave is granted. The memorandum has been considered. The petition for rehearing is denied.

In view of the position we have taken, there is also denied the motion for an order remanding the cause to the lower court for trial and the motion for a supplemental opinion. It is so ordered.

Endorsed: Filed May 21, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the twenty-fourth day of May, 1940, there was filed in the office of the Clerk of this Court, a Motion for stay of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7030.

Armour and Company, a corporation,
Plaintiff-Appellant,
vs.
The Alton Railroad Company, a corporation, *et al.*,
Defendants-Appellees.

On Appeal from the Order of Judge Holly, Entered in the District Court of the United States for the Northern District of Illinois, Eastern Division.

MOTION FOR STAY.

To the Honorable United States Circuit Court of Appeals for the Seventh Circuit, and to the Honorable Judges thereof:

Now comes the Plaintiff-Appellant herein, and respectfully moves for order of this Court, staying its mandate herein for a period of thirty days, in order to afford to Plaintiff-Appellant opportunity to prepare and file in the Supreme Court of the United States its petition, praying for review of the decision of this Court on writ of certiorari.

Dated at Chicago, Illinois, May 24th, 1940.

Chas. J. Faulkner, Jr., (sgd)
Walter C. Kirk, (sgd)
Paul E. Blanchard. (sgd)

Endorsed: Filed May 24, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the twenty-fifth day of May, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, May 25, 1940.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

Armour and Company, *Plaintiff-appellant,* 7030 *vs.* The Alton Railroad Company, *et al.,* *Defendants-appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the mandate of this Court in this cause be, and the same is hereby stayed pursuant to Rule 25 of the Rules of this Court.

And afterwards, to-wit: On the thirteenth day of June, 1940, there was filed in the office of the Clerk of this Court, a motion for further stay of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030.

Armour & Company, a corporation, *Appellant,* vs. The Alton Railroad Company, a corporation, *et al.*, *Appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable William H. Holly, Judge Presiding.

MOTION FOR FURTHER STAY OF MANDATE.

Now comes Plaintiff-Appellant and respectfully moves for order of this Court (under the provisions of Rule 25 of this Court), further staying the mandate of this Court to and including July 15th, 1940, for the purpose of permitting Plaintiff-Appellant additional time within which to prepare and file its petition to the Supreme Court of the United States for review of the decision of this Court on writ of certiorari.

In support of its motion Plaintiff-Appellant shows that the counsel who briefed and argued this case in this Court, and in the lower State and Federal Courts, must engage in the trial of other causes before another tribunal, viz., the Interstate Commerce Commission, beginning June 17th at Washington, D. C., and June 24th at Louisville, Kentucky, which causes necessitate his departure from the city on June 14th, and his absence therefrom until on or about July 1st, 1940. That the magnitude of said proceedings is so great, and the parties involved therein so numerous, that a postponement thereof probably cannot be obtained, so that Plaintiff-Appellant has no other counsel sufficiently familiar with the facts and issues in this case, or with the facts and issues in the causes to be tried, to permit sub-

stitution of counsel in either proceeding without great risk to its rights involved in said cases.

Dated at Chicago, Illinois, this 13th day of June, 1940.

Chas. J. Faulkner, Jr.,
Walter C. Kirk,
Paul E. Blanchard,
Attorneys for Plaintiff-Appellant.

Service of the foregoing Motion for further stay of mandate is hereby accepted this 13th day of June, 1940, and the undersigned consents to the extension requested in said motion.

Sidley, McPherson, Austin & Burgess,
By D. Robert Thomas, Jr.

Hay, Morton & Freytag,
By Meyer Morton,
Frank H. Towner,
Bryce L. Hamilton.

Endorsed: Filed June 13, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fourteenth day of June, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, June 14, 1940.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

7030	Armour and Company, *Plaintiff-Appellant,* *vs.* The Alton Railroad Company, *et al.,* *Defendants-Appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellant, it is now here ordered that the issuance of the mandate of this Court be further stayed to and including July 15, 1940.

And afterwards, to-wit: On the eleventh day of July, 1940, there was filed in the office of the Clerk of this Court, a motion for further stay of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030.

Armour & Company, a corporation, *Appellant*,
vs.
The Alton Railroad Company, a corporation, *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable William H. Holly, Judge Presiding.

MOTION FOR FURTHER STAY OF MANDATE.

Now comes Plaintiff-Appellant and respectfully moves for order of this Court (under the provisions of Rule 25 of this Court), further staying the mandate of this Court to and including August 1st, 1940, for the purpose of permitting Plaintiff-Appellant additional time within which to prepare and file its petition to the Supreme Court of the United States for review of the decision of this Court on writ of certiorari.

Dated at Chicago, Illinois, this 11th day of July, 1940.

Chas. J. Faulkner, Jr.,
Walter C. Kirk,
Paul E. Blanchard,
Attorneys for Plaintiff-Appellant.

Service of the foregoing Motion for further stay of mandate is hereby accepted this 11th day of July, 1940, and the undersigned consents to the extension requested in said motion.

Sidney, McPherson, Austin & Burgess,
By Douglas F. Smith.
Hay, Morton & Freytag,
By Elmer W. Freytag,
Frank H. Towner,
Bryce L. Hamilton.

Endorsed: Filed July 11, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the twelfth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, July 12, 1940.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

7030	Armour and Company, *Plaintiff-Appellant,* *vs.* The Alton Railroad Company, *et al.,* *Defendants-Appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellant, it is now here ordered that the issuance of the mandate of this Court be further stayed to and including August 1, 1940, for the purposed of permitting appellant additional time in which to prepare and file its petition for a writ of certiorari in the Supreme Court of the United States.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 67 to 98, inclusive, contain a true copy of the proceedings had and papers filed (excepting briefs of counsel, motion, and stipulation and orders relative to briefs, brief on petition for hearing, answer thereto and memorandum to answer) in the case of:

Cause No. 7030.

Armour and Company,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, *et. al.*,
Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 29th day of July, A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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[fol. 100] INTERSTATE COMMERCE COMMISSION

No. 27862

SWIFT & COMPANY, et al.

v.

ALTON RAILROAD COMPANY, et al.

Submitted June 21, 1939. Decided April 8, 1940

1. Transportation of direct shipments of livestock consigned to complainant at the Union Stock Yards, Chicago, Ill., found to be completed when the livestock is placed in the unloading pens at the Union Stock Yards. Yardage charges assessed by the Union Stock Yards & Transit Company of Chicago on direct shipments of livestock transported to the Union Stock Yards for services performed and facilities used beyond the gates leading from the pens in the stock yards into which the livestock is unloaded from railroad cars, found not subject to the jurisdiction of the Commission.

2. Defendants' failure to afford egress for direct shipments of livestock transported to the Union Stock Yards found not to have resulted or to result in an unreasonable practice.

3. Complaint dismissed.

R. D. Rynder for complainants.
Paul E. Blanchard for intervener.
H. R. Park for interested party.
Douglas F. Smith, Kenneth F. Burgess, and Robert Thomas for defendants.

REPORT OF THE COMMISSION

SPLAWN, Commissioner:

Exceptions were filed to the examiner's report by complainant; defendants replied; and the parties were heard in argument.

Complainants are Swift and Company, and G. H. Hammond Company and Omaha Packing Company, wholly

owned subsidiaries of Swift & Company. They, with the exception of G. H. Hammond Company, are engaged in the packing-house business and operate packing plants for the processing of livestock at Chicago, Ill. G. H. Hammond Company formerly operated a packing plant, but since the complaint was filed operation of the plant has ceased. Complainants' plants are located adjacent to the Union Stock Yards in Chicago, owned and operated by The Union Stock Yard and Transit Company of Chicago, hereinafter referred to as the Yard Company. The defendants are common carriers by railroad engaged in the transportation of livestock to Chicago. The Yard Company is not named a defendant. [fol. 101] Although livestock consigned to G. H. Hammond Company and Omaha Packing Company at the Union Stock Yards has arrived at those yards in the past, the volume of shipments so consigned has been small. The bulk of the traffic about which complaint is made has been consigned to Swift & Company. For convenience, Swift & Company will be referred to as if it were the only complainant.

It is alleged, in substance, by complaint filed September 20, 1937, that defendants' failure to afford the right of egress for livestock from unloading pens at the Union Stock Yards to the nearest public street, in connection with direct shipments of livestock consigned to complainant, free from any charge other than the line-haul rate, has resulted and results in an unreasonable practice. We are asked to require defendants to cease and desist from the alleged unlawful practice, and to establish and maintain reasonable means of egress from the unloading pens at the Union Stock Yards to the public streets free from the payment of any charges other than the line-haul rate. We are also asked to award reparation to each complainant for charges paid by reason of the alleged unlawful practice during the period of 2 years preceding the filing of the complaint and during the pendency of this proceeding.

Armour and Company filed a petition of intervention in support of the complaint. In this petition it was stated that it had instituted a proceeding in the State Court of Illinois involving substantially the same issues, and praying for similar relief. The proceeding in the State court was subsequently removed to the United States District Court for the Northern District of Illinois, Eastern Division, and motions by defendants to dismiss were sustained May 31, 1939.

The situation complained of may be described as follows. A carload of livestock is shipped from a point in Iowa, consigned to Swift & Company at the Union Stock Yards in Chicago. This is known as a direct shipment, as distinguished from a shipment consigned to a commission merchant at the stockyards for sale. Under the provisions of section 15 (5) of the Interstate Commerce Act, the transportation includes delivery of the livestock into suitable pens at the stockyards at the line-haul rate without extra charge to the shipper or consignee. The livestock is transported by defendants to unloading platforms on the property of the Yard Company. Upon arrival of the car at the unloading platform, the car door is opened by employees of the Yard Company and the livestock is driven by employees of the same company through chutes into unloading pens adjacent to the unloading platforms. The unloading platforms, chutes, and pens are owned by the Yard Company. If employees of Swift & Company are at [fol. 102] the unloading pens when the animals are placed therein, the animals are driven by Swift & Company's employees from the unloading pens through the property of the Yard Company to Swift & Company's plant located outside of the stockyards. If employees of complainant are not at the unloading pens when the animals are placed therein, and if the volume of livestock arriving at the unloading pens is sufficient to necessitate immediate removal of the animals from the loading pens to holding pens located throughout the yards, the animals are driven from the unloading pens to holding pens in the stockyards by employees of the Yard Company, and are later driven from the holding pens through the Yard Company's property to Swift & Company's plant by employees of the latter company. Irrespective of whether possession of the animals is taken at the unloading pens or at the holding pens by Swift & Company's employees, Swift & Company is required to pay a yardage charge on each animal. This yardage charge is assessed, collected, and retained by the Yard Company, under authority of a tariff filed by that company with the Secretary of Agriculture.

Complainant's claim is that delivery of the livestock into suitable pens at the stockyards includes delivery to it in such manner as to permit the animals to be removed by its employees from the unloading pens to the nearest public street without the payment of a yardage charge. It seeks

to be relieved of the payment of the yardage charge on shipments of livestock consigned to it at the Union Stock Yards.

A complaint containing issues substantially similar was considered by the Supreme Court in Atchison T. & S. F. Ry. Co. v. United States, 295 U. S. 193, in which our order in Hygrade Food Products Corp v. Atchison, T. & S. F. Ry. Co., 195 I. C. C. 553, was set aside. Complainant contends that it is presenting a case different from that considered and decided in the above proceedings.

The Union Stock Yards, owned and operated by the Yard Company, is located in Chicago and is the terminal at which the preponderant amount of the livestock transported by rail to Chicago is received. It is the largest livestock market in the United States and is the only public market for the sale of livestock in Chicago. Immediately west of the Union Stock Yards is an area commonly known as Packingtown. The plants of Swift & Company and other packers are located in this area. It is physically impossible to remove livestock from the unloading pens in the stockyards to complainant's plant or to public streets except by use of the Yard Company's property. The Yard Company, with respect to part of its business, is a common carrier of freight [fol. 103] by hire, is engaged in interstate commerce, and is subject to the Interstate Commerce Act.[1] It is also a stock yard owner as that term is defined in the Packers and Stockyards Act.[2] As such, it is engaged in operating a public stockyard. In the operation of its business as a stockyard owner, it is subject to the jurisdiction of and regulation by the Secretary of Agriculture.

The Yard Company has a tariff on file with the Secretary of Agriculture, in which it publishes yardage charges applicable on all livestock received at the Union Stock Yards. These charges are 45 cents per head on cattle, 35 cents on

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[1] United States v. Union Stock Yard & Transit Co., 226 U. S. 286; Livestock Loading and Unloading Charges, 52 I. C. C. 209; Livestock Loaded and Unloaded at Chicago, 213 I. C. C. 330; Cancelation of Livestock Services at Chicago, 227 I. C. C. 716; Union Stock Yard & Transit Co. v. United States, 308 U. S. 213.

[2] Sections 201 to 229 of the Packers and Stockyards Act, Title 7, U. S. C. A.

calves (400 pounds or under), 15 cents on hogs, and 10 cents on sheep, and are assessed and collected by the Yard Company on every animal unloaded from railroad cars at the stockyards.

With respect to direct shipments, these charges are compensation for services performed by the Yard Company after the stock is placed in unloading pens and for the use of its facilities, such as holding pens, alleys, and ways in the stockyards. With respect to shipments consigned to commission men, the yardage charges cover, in addition to the services on direct shipments, use of the Yard Company's facilities pending the sale of the livestock, and the use of facilities for removal of the stock from the yards after it is sold.

The tracks of the line-haul carriers do not reach the stockyards, which are served exclusively by tracks owned by the Yard Company and leased by it to The Chicago River and Indiana Railroad Company. By authority of trackage rights and the use of their own crews and power, all livestock consigned for delivery at the stockyards is placed by the trunk lines on the tracks adjacent to the unloading platforms. When the livestock reaches the unloading platforms, no one is permitted by the Yard Company to handle the animals except employees of that company. This is necessary for the efficient and orderly handling of the large number of shipments arriving at the yards.

The bulk of the movement is received at the yards during the first days of the week, and approximately three-fourths of the daily movement is unloaded between 3 and 8 a. m. In some instances, immediate removal of the animals from the unloading pens is necessary to preserve an even flow of livestock from the cars into the yards.

During the more than 70 years of its existence the Union Stock Yards has been the principal terminal at which live- [fol. 104] stock consigned to Chicago has been received. Since the beginning of its operations, the Yard Company has assessed and collected from the shipper a yardage charge on every animal unloaded on its premises, irrespective of whether the shipments were direct shipments to a packer or whether they were consigned to a commission merchant for sale. Prior to 1927 the number of direct shipments received at the Union Stock Yards by complainant was relatively small. About that time, various conditions combined to make it necessary for the packers, including complainant, to purchase livestock in greater quantities at country points,

and to have such shipments consigned to them at Chicago. By 1929 the number of direct shipments to complainant at the stockyards grew to a substantial amount. This condition continued for several years until complainant began to consign its direct shipments to the plant of its subsidiary, Omaha Packing Company, located approximately 2 miles from the Union Stock Yards. Thereafter the number of direct shipments consigned to complainant at the stockyards decreased. During the first 4 months of 1938, 18 cars of direct shipments were received by complainant at the Union Stock Yards. At the hearing herein it was stated that practically all of complainant's direct shipments are being made to the plant of the Omaha Packing Company and that no such shipments are being received at the Union Stock Yards. By having its shipments consigned to the plant of the Omaha Packing Company, complainant is relieved of the payment of the yardage charge. The stock received at the plant of the Omaha Packing Company is transported by motortruck over the streets in Chicago to complainant's plant.

In May 1933 complainant advised the traffic officers of defendants and the Yard Company that it was prepared to accept direct shipments of livestock at the reasonable and proper pens of each defendant at the Union Stock Yards, and to remove the livestock to its own plants within a reasonable time without other use of the Yard Company's facilities; and that on and after May 25, 1933, it would refuse to pay any yardage charges on direct shipments consigned to it at the Union Stock Yards. The Yard Company notified complainant that it would not be permitted to take possession of direct shipments at the unloading pens unless the yardage charges were paid, and that until the threat of not paying such charges was withdrawn, or until they were paid, the Yard Company would not permit livestock consigned to complainant to be delivered to it or its employees. Complainant then notified defendants that on and after May 25, 1933, the Yard Company had no authority to accept or receive livestock for complainant's account; that any delivery by defendants of complainant's livestock to the Yard Company for unloading and delivery, except as defendants' agent, would constitute a conversion of complainant's [fol. 105] property; and that payment of yardage charges to the Yard Company made to gain possession of its property would be made by complainant under protest.

As a result of subsequent correspondence between complainant and the Yard Company, the Yard Company agreed to accept payment of the yardage charges with the understanding that such payments would be made under protest. It was also agreed that it would be understood that, with respect to each direct shipment made thereafter, complainant had made a physical demand for delivery and the right to promptly remove the stock from the premises of the Yard Company without the payment of yardage charges, and that the demand had been refused by the Yard Company. Each of the defendants refused complainant's demands. Later, in September 1935, the demands were repeated in letters sent to the defendants and were again refused.

Since May 25, 1933, in each instance in which complainant has paid yardage charges on direct shipments it has done so under protest. At stated intervals since the above date, it has rendered bills against each defendant for the amount of yardage charges paid to the Yard Company under protest.

There is no dispute with respect to the character of service in the stockyards required on direct shipments. All of such shipments have been purchased at points other than Chicago for shipment to Chicago for immediate slaughter. The livestock comprising such shipments is not fed or watered in the yards. It has not been weighed on scales of the Yard Company since 1933, when complainant installed scales tested and supervised by the Western Weighing and Inspection Bureau, an agency of defendants, on its own property where the weighing is done by complainant's employees. Complainant does not request or desire that any of its direct shipments be held or placed in holding pens. It is prepared to have crews of men ready at any hour of the day or night to move its stock from the unloading pens.

Complainant demands that defendants accord it the right to take possession of the animals at the unloading pens immediately after they are placed in such pens, and to remove them immediately from such pens through the property of the Yard Company to the nearest public street free from the payment of a yardage charge. Several suggestions as to means of egress were made. It was emphasized, however, that complainant is not demanding egress at any particular points but simply egress to a public street or highway via the shortest or most convenient way, to be designated by defendants. Because of the physical situation at

[fol. 106] the Union Stock Yards, defendants could not provide an egress from the unloading pens to a public street, except by use of the property of the Yard Company.

As hereinbefore stated, since the establishment of the stockyards more than 70 years ago, the Yard Company has collected a yardage charge on every animal unloaded from a railroad car at the Union Stock Yards, regardless of whether the stock was consigned to a packer for immediate slaughter or to a commission merchant for sale. This custom and practice not only has prevailed at Chicago but was accepted as a reasonable practice by the interested parties until 1933, when complainant made its first protest against the practice. During a substantial portion of the period referred to, complainant not only paid the yardage charge without protest, but, in association with other packers, demanded and received participation with the Yard Company in the profits of the latter company. These facts are shown in copies of the following documents which were received in evidence: Agreement dated January 15, 1892, between the Chicago Junction Railway and Union Stock Yards Company of New Jersey, a holding company which owned practically all the stock of the Yard Company, and Philip D. Armour and others, Nelson Morris and other, and Gustavus F. Swift and others; a similar agreement of the same date, between the New Jersey Company and certain smaller packers; complaints filed in 1891 by Swift & Company, Armour & Company, and other packers against the Yard Company in the circuit court of Cook County, Ill.; answers to said complaints filed by the Yard Company; stipulations dismissing the above complaints; and extracts from a report of the Federal Trade Commission on the meat-packing industry, dated June 28, 1919.

Complainant objected to the receipt in evidence of the above-described documents. Pursuant to complainant's request, a further hearing was held to afford it an opportunity to introduce evidence relating to the documents. At the further hearing evidence bearing on certain matters embraced in the documents was introduced on behalf of complainant. At the conclusion of the further hearing before the examiner, complainant's counsel moved that the documents and the evidence bearing thereon be stricken from the record. The motion is overruled.

Since 1865, when the Yard Company began operations, there has been a line of demarcation between the services

which shippers were entitled to receive for the transportation charges and the services received from the operator of the stockyards. The line-haul carriers pay the Yard Company for the unloading service and absorb the charge made for such service out of their line-haul rates. From the beginning, all shippers were required to pay to the Yard Company a yardage charge on every animal unloaded at the [fol. 107] yards. The amounts of these charges were determined solely by the Yard Company, the services and facilities were furnished solely by the Yard Company, and the dealings with respect to the yardage charges were solely between the Yard Company and the shippers. The practices described had been in effect for practically 25 years, when certain transactions described in the documents referred to were entered into by the Yard Company and certain packers, including complainant and intervener, under which the packers received participation in the profits from the Yard Company's operations.

The evidence shows that at some time prior to 1890 the packers had threatened to move their plants from Chicago and to establish facilities of their own for the receipt of their livestock. This was a matter of concern to the Yard Company because its revenue was received in large measure from the charges collected on livestock slaughtered by the packers. The packers had acquired a large tract of land in Indiana to be used as a new site for their plants. They had also purchased property known as the "Central Stock Yards," near the property of the Yard Company, and had erected on these premises platforms, pens, sheds, and sidings "for the purpose of receiving and distributing among themselves any and all cattle and live stock owned or purchased by them outside of the City of Chicago or directly consigned to them, and thereby avoiding the payment of yardage charges" to the Yard Company. They had also demanded, in complaints filed in Illinois, that the Yard Company be required to permit the line-haul carriers to use its tracks in making deliveries to the Central Stock Yards.

The steps taken by the packers to relieve themselves of the payment of yardage charges resulted in the execution of the contract of January 15, 1892. By the terms of this contract, the packers agreed to convey to the New Jersey Company, owner of the Yard Company, the Indiana site and the Central Stock Yards; to dismiss the suits filed in the Illinois court, and to refrain from filing similar suits during the

life of the agreement, which was for 15 years; to continue their business at Packingtown for 15 years from July 1, 1891; "to guarantee that any and all live stock slaughtered by them on their premises or within 200 miles of the City of Chicago, during such period, shall pass through and use said yards, and to pay the usual yardage charge therefor;" to guarantee that the Yard Company "shall receive and collect from its yardage charges on cattle and livestock owned or purchased by or conveyed to said parties of the second part (the packers) and said companies, at said yards, the aggregate sum of at least $2,000,000 within six years," and to make up any deficiency in that amount. The packers also agreed that as long as the Yard Company conducted its busi- [fol. 108] ness at Chicago they would not interest themselves in any other stockyards in Chicago for the receipt and use of their own livestock.

The consideration for the above covenants by the packers was the receipt by them of income bonds of the New Jersey Company in the amount of $3,000,000. Complainant received approximately one-third of these bonds which were subsequently redeemed by the New Jersey Company.

It appears that during the existence of the agreement described, the packers, including complainant, agreed to pay the yardage charges, participated in the receipts of the Yard Company from said charges, and considered the assessment of such charges on their shipments a matter between themselves and the Yard Company. The railroad companies were not parties to the agreement, and there is nothing in the record to indicate that the packers deemed the collection of the yardage charges to be an unreasonable practice on the part of the railroad companies. On the contrary, the action of the packers shows that at the time the agreement was entered into they did not consider the assessment of the yardage charges a matter in which the railroads were in any way concerned.

The agreement of 1892 expired in 1907, except for the covenant by the packers not to use any other stockyards for the receipt of their livestock so long as the Yard Company maintained its business in Chicago. The report of the Federal Trade Commission shows, however, that stockholders of the New Jersey Company were informed that the packers were still threatening to move their plants from Chicago and that some arrangement must be made to hold them.

It is shown that complainant expected to receive a share of the Yard Company's earnings as late as 1918, but there is no proof that it did receive anything in addition to the bonds received under the contract of 1892. The report definitely shows, however, that J. O. Armour, of Armour & Company, received substantial benefits after 1907 from the earnings of the Yard Company, by reason of the control he exercised with F. H. Prince of Chicago Stock Yards Company, a holding company organized by them for the purpose of controlling the New Jersey Company, which, in turn, owned the Yard Company.

The important fact is that, after the agreement of 1892 expired, the packers continued to pay the yardage charge, made no complaint to the railroads against its assessment, and for several years attempted to share in, and one of them actually did share in, the revenues received by the Yard Company. In an appearance before a Congressional committee in 1919, L. F. Swift, an official of complainant, testified as follows:

[fol. 109] I know that we wanted this arrangement (under the 1892 contract) to continue. * * * He (Prince) told me if I would keep still and not press the matter—not move our plant or threaten to move it, keep still, I might get something after a while.

The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards has ended with the unloading service, and that by affirmative action, beginning abou 1890 and continuing for many years, the packers, including complainant and intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads. The position of the packers was that their patronage of the services and facilities of the Yard Company was a thing of value to the Yard Company and that they proposed to sell that patronage to the Yard Company. They succeeded in obtaining an interest in the business of the Yard Company by threats to terminate the practice of taking delivery of their direct shipments through the agency of the Yard Com-

pany and to receive the stock at their own yards. As owners of income bonds of the Yard Company, and with a voice in its management (the general counsel of complainant was a director of the Yard Company in 1894), the packers continued to pay the yardage charges, guaranteed the earnings therefrom for a limited period, and guaranteed for an unlimited period never to receive livestock in Chicago other than at the Union Stock Yards.

The line-haul carriers have never performed services on direct shipments of livestock transported to the Union Stock Yards after it is unloaded. They have no voice in the nature of the yard services provided or in the manner in which they are performed. They have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover yardage services. The Yard Company furnishes the services and facilities for which the yardage charges are assessed. Prior to 1921 it fixed the measure of the charges, and since that date it has performed the same function under the supervision of the Secretary of Agriculture.

For many years the packers, including complainant, made the practice of which they now complain their own practice. They gave up their own terminal facilities at the Central Stock Yards for a substantial consideration, and, by their covenants with the Yard Company, made the Union Stock Yards their own terminal facilities in Chicago.

[fol. 110] Under the provisions of the applicable tariffs of individual railroads serving Chicago, the shippers of livestock have the choice either of consigning it to the Union Stock Yards, and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. In the latter case, they unload the cars themselves. Although the facilities available at such team tracks for the unloading of livestock are not extensive, and do not include pens into which the stock may be unloaded, they have been found ample for such shipments as have been placed on such tracks for unloading. Many carloads of livestock, consigned principally to the small packers, are received and unloaded on such tracks. In addition, under the tariffs of the line-haul carriers, the packers, including complainant,

may, if they choose, specify delivery of direct shipments on industry tracks serving their plants, by paying the published switching charges in addition to the line-haul rate. More than one-third of the direct shipments of livestock arriving at Chicago are unloaded at points other than the Union Stock Yards. It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards only when complainant elects to take delivery there.

An analysis of the billing of 3,061 cars, comprising direct shipments of livestock to complainant, unloaded at the Union Stock Yards from January 1935 to March 1938, both inclusive, shows that 84.4 per cent were consigned by representatives of complainant to the Union Stock Yards, and that the remaining 15.6 per cent were delivered to the stockyards, although delivery at that point was not specified in the livestock contract. Under the terms of the contract, complainant could have required delivery of the 15.6 per cent of shipments either at the stockyards or on defendants' team tracks, but complainant never requested delivery of those shipments to any point other than the Union Stock Yards.

The determination of the question at issue in this proceeding requires the determination of the point at which the transportation of direct shipments of livestock to the Union Stock Yards ends. If the transportation ends when the stock is placed in unloading pens, the obligation of the defendants ceases at that point. If, however, the transportation does not end until after complainant has removed the stock beyond the boundary of the stockyards, then there is an obligation on the part of defendants to provide means by which removal of the stock may be accomplished free from the payment of a yardage charge.

Issues substantially similar to those here presented have been considered and decided in Hygrade Food Products [fol. 111] Corp. v. Atchison, T. & S. F. Ry. Co., supra, and Atchison, T. & S. F. Ry. Co. v. United States, supra. In the complaint in the above proceeding filed against both the line-haul carriers and the Yard Company, it was alleged that the practice of the line-haul carriers and the Yard Company in making the stockyards their terminal for delivery of livestock, pursuant to an arrangement by which the Yard Company imposed a yardage charge, was an unjust and unreasonable practice. We found that livestock consigned

to complainant at the stockyards was not subject to yardage charges in instances where delivery of stock was taken by complainant at the unloading pens. Upon appeal, the Supreme Court reversed our finding, and, in its opinion, stated:

> Usage and physical conditions combine definitely to end transportation, at least in respect of these shipments, with unloading into *situ*able pens as is now required by section 15 (5). * * * The statute cited clearly discloses the intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends.

It is to be noted that the Supreme Court stated that, in respect of the particular shipments involved, transportation ended at the unloading pens.

The Court also found that section 15 (5) of the Interstate Commerce Act "left undisturbed the Yard Company's practice of making a charge for livestock received," and that the Packers and Stockyards Act, enacted about a year later, defined the practice of the assessment of yardage charges as a stockyard's practice, and subjected the services for which the charges were made to the jurisdiction of the Secretary of Agriculture.

Complainant here contends that the issue in this proceeding differs from that decided in the Hygrade case; that the complainant in the Hygrade case was using runways, alleys, an overhead viaduct, and a tunnel belonging to the Yard Company; and that it was, in effect, demanding that the carriers provide a delivery beyond their own terminals into the Hygrade plant, whereas complainant here is demanding only egress from the unloading pens to the nearest public street. The alleged difference is not one of substance, because the evidence in this proceeding shows that alleys, ways, and, in some instances, overhead viaducts belonging to the Yard Company must be used to remove animals from the unloading pens to the public streets. In the Hygrade case it was shown that possession of a substantial portion of complainant's shipments was taken by complainant at the unloading pens, and the Supreme Court stated that, with respect to such shipments, transportation ended at the unloading pens.

[fol. 112] Reference is made by complainant to certain language [3] of the Court as a clear intimation that the consignee of the livestock was and is entitled to a mere egress and a mere way out of the stockyards. Such an interpretation of the language referred to is inconsistent with the statement of the Court that "Usage and physical conditions combine definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by section 15 (5)." In the statement referred to by complainant, the Court was contrasting the situation at public stockyards with the situation at livestock terminals other than public stockyards, and it did not draw a contrast between a route through public yards to a street and thence to a packing plant with a route through public yards to the street. The evidence here conclusively shows that there is no essential difference between the routes and the services required from the unloading pens to plants outside the stockyards and a way out to the public highways. In either case, property of the yard company must be used.

Emphasis is placed by complainant on the provisions of the act which define "transportation" and to the inclusion in that term of the word "delivery," and it is contended that our jurisdiction is co-extensive with transportation as defined in section 1 (3) of the act, including all services in connection with the delivery of livestock. Decisions are cited which hold, in effect, that property shipped remains in transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station. This is true of traffic generally, but transportation of livestock to public stockyards and the delivery embraced therein is provided for in a particular section of the act.

The provision of the act which differentiates between livestock and other carload freight with respect to the un-

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[3] "So the long established and uniform practice to provide a route via the overhead runway to the Hygrade plant distinguishes the use of the Yard Company's properties for this service from mere egress such as is included in the transportation of live stock to destinations other than public stockyards. Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways."

loading service is the amendment made in 1920 to section 15 embodied in paragraph 5 of that section. The material portion of the amendment is as follows:

> Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request [fol. 113] of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations.

There is nothing in the amendment which imposes an obligation upon defendants to compensate the public stockyards for the use of the facilities necessarily involved in removing the direct shipments from the suitable pens to the boundary of the Yard Company's property. It would appear that had such been the intention of Congress, the words "delivery at public stockyards of inbound shipments into suitable pens" would have read "into suitable pens and from those pens to the boundary of the stockyards." The amendment indicates an intention by Congress to constitute the pens as the point where the duties of the defendants terminate. The word "suitable" is descriptive of the character of the pens into which the stock must be unloaded and does not, under a reasonable interpretation of the language used, refer to the character of egress from the pens to the boundary of the yards.

Complainant takes the position that there is nothing in the language of section 15 (5) that narrows or restricts our jurisdiction; that the provision is remedial and is entitled to a liberal interpretation that fairly accomplishes its purpose; that under such an interpretation it would seem that a pen from which it is impossible for a consignee, who is on hand when his stock is unloaded, to take his shipments without extra charge cannot be a suitable pen; that there is nothing in the provision to indicate that Congress meant to take away the opportunity to obtain complete possession of the property at destination; and that the contention that our jurisdiction ends at the unloading pens comprehends

the proposition that defendants' common-law duty has been reduced by section 15 (5).

The sole purpose of the amendment to section 15 was to deal permanently and by legislation with the then-pending controversy, later considered by the Supreme Court in Adams v. Mills, 286 U. S. 397. For almost 50 years prior to the decision of the Supreme Court in 1912, holding the Yard Company to be a common carrier,[4] it had maintained two charges—a charge for unloading the livestock, and a yardage charge imposed on all animals in addition to the unloading charge. The unloading charge had always been absorbed by the line-haul carriers, and the yardage charge had always been paid to the Yard Company by the shippers. Effective May 30, 1913, the Yard Company filed a tariff with us in which it published its charge for the unloading service. Neither that tariff nor any other tariff ever filed by the Yard Company with us included its yardage charges. In 1917 the Yard Company increased its unloading charge [fol. 114] from 25 to 50 cents per car; the line-haul carriers refused to absorb the increase, and the additional amount was collected by the Yard Company from the shippers. The livestock producers protested the collection of the unabsorbed 25 cents per car and filed a complaint with us to recover it. The producers did not complain against the yardage charge they were then paying, nor have they ever complained against the assessment of that charge. It is significant that at that time the producers were concerned actively with the question of where transportation should be held to end, both by opposing the assessment of an additional charge for unloading and by advocating the amendment to section 15, subsequently enacted.

The amendment originated with and was sponsored by the National Live Stock Shippers League and the American Live Stock Association, which were producers' organizations. Senator Cummins, in proposing the amendment, said:

I am entirely in sympathy with the purpose of these shippers, and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rates that must be paid by the shippers for the entire service of

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[4] United States v. Union Stock Yard & Transit Co., supra.

taking property at the point of origin and *delivering it to the point at which it is to leave the car.* (Emphasis supplied.)

Later, in 1921, when introducing the Packers and Stockyards Act in the House of Representatives, Congressman Haugen stated:

> It is proposed to give the Secretary of Agriculture * * * jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. *Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction* * * *. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends * * *. (Emphasis supplied.)

Evidence of the intent of section 15 (5) is to be found in the interpretation placed upon it from the date of its enactment both by the packers and the producers. In 1921 pursuant to all requirements of the Packers and Stockyards Act, the Yard Company filed a tariff with the Secretary of Agriculture, in which it published the yardage charges which it had previously assessed on all animals unloaded in the yards No complaint has ever been made by the producers who sponsored the amendment regarding the payment of the yardage charge.

Additional evidence of the intent of section 15 (5) is to be found in the conduct of complainant and other packers since its enactment. When the amendment was proposed, the yardage charges had long been a matter of concern to the packers. They had sought to avoid the payment of the charges by threatening to move their plants and by acquiring the Central Stock Yards; they had sued the Yard Com- [fol. 115] pany to compel it to permit delivery of direct shipments over its rails at the Central Stock Yards; and, upon receiving an interest in the Yard Company's business under the contract of 1892, they gave up the Central Stock Yards and continued to pay yardage charges. For a number of years after expiration of the contract of 1892 they had sought to have the arrangement under which they participated in the Yard Company's profits renewed. The acquiescence by the packers in the assessment of the yardage charge is evidence that they did not believe that section 15

(5) could reasonably be given the meaning they now urge. The packers' interpretation of the amendment is also shown by their affirmative action. The first case to present the question of the effect of section 15 (5) on the yardage charges on direct shipments arose in connection with charges made by the Fort Worth Stock Yards Company, a public stockyard. Southwestern Horse & Mule Assn. v. A., T. & S. F. Ry. Co., 129 I. C. C. 730 (1927). The stockyards company successfully contended that we had no jurisdiction of the yardage charge because, under section 15 (5) the transportation of livestock to public stockyards terminated with the unloading. That company's policies were controlled by Swift & Company and Armour & Company, complainant and intervener herein, which owned 66.8 percent of the voting stock. It also appears that on July 1, 1928, at several public stockyards in which the packers held a substantial interest, yardage charges were being assessed on direct shipments. The date of July 1, 1928, was selected because, at that time, the packers were in unlimited possession and control of voting stock of the yard companies referred to.

Direct shipments of livestock transported by rail to packers at Chicago have exceeded 30,000 carloads annually for several years, as compared with a total annual average rail movement to the Union Stockyards of 94,629 cars. The shift from producers' consignments to direct shipments is rapidly increasing. The evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago.

Reference is made both by complainant and defendants to proceedings before us in which the question of yardage charges has been considered. An examination of the cases cited shows that in only two of them has the question here presented been determined.

The first case, after the enactment of section 15 (5), in which the question was raised was Southwestern Horse & Mule Assn. v. A., T. & S. F. Ry. Co., supra. There we held that the yardage charges on direct shipments of livestock consigned to a public stockyard for dealers whose places of business were outside the yards were beyond our jurisdic- [fol. 116] tion. The basis for our finding was that transportation to public stockyards ended when the animals were unloaded into suitable pens.

The other case in which an issue similar to the issue herein was considered was Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co., supra. There complainant's employees had taken possession of approximately 15 per cent of their direct shipments at the unloading pens of the Union Stock Yards in Chicago and had driven such shipments through the yards to its plant. In such instances, we found the assessment of yardage charges unlawful. As hereinbefore shown, the Supreme Court stated that, with respect to the shipments in question, transportation ended when the animals were placed in the unloading pens.

Since the decision of the Supreme Court in the Hygrade case, the Court and we have interpreted that decision as holding that transportation of direct shipments of livestock to a public stockyard terminates at the unloading pens. See Denver Union Stock Yard Co. v. United States, 304 U. S. 470; Livestock to or from Union Stock Yards, Chicago, 222 I. C. C. 765.

In the administration of the Packers and Stockyards Act, the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at many public yards. Orders of the Secretary pre-cribing the charges for this service at three public stockyards have been sustained in court proceedings. See St. Joseph Stock Yards Co. v. United States, 298 U. S. 38; Denver Union Stock Yards Co. v. United States, supra; Union Stock Yards Co. of Omaha v. United States, 9 Fed. Supp. 864. The yardage charges now applicable at the public stockyards at St. Joseph, Mo., Denver, Colo., and Omaha, Nebr., for use of facilities and services of the yard companies in connection with egress for direct shipments consigned to packers are those prescribed by the Secretary.

Defendants contend that we cannot enter an effective order in this complaint granting the relief sought, because the Yard Company is an indispensable party and is not named a defendant. It points out that the Yard Company is a common carrier subject to the act and is solely responsible for the practice complained of; that it levies, collects, and retains for itself the yardage charge; that it denies use of its property unless the yardage charges are paid to it; and that it alone can modify or permit the modification of the charges and practices complained of. In view of our findings herein, it is unnecessary to determine this question.

The language of section 15 (5) specifies the services to be included in the transportation to public stockyards, and it clearly states that it shall include delivery into suitable pens. [fol. 117] That does not mean delivery to a public street, delivery to a plant connected by a runway or viaduct with the stockyards, or delivery to a private way which may lead from the stockyards proper. It means delivery into pens on the stockyards' property which are suitable to receive the stock in a safe manner. Had Congress intended to require delivery of the stock beyond the boundary of the public stockyards, it would have so stated. The kind of transportation covered by the provision is transportation to public stockyards, as distinguished from transportation to other than public stockyards. It would be unreasonable to assume, in view of the express language used, that the term transportation was intended to include not only delivery into suitable pens but also the removal from such pens to the public highways.

The above interpretation is the interpretation placed upon the amendment since its enactment by the actions of the packers, including complainant and intervener, of the producers, of the Yard Company, and of the railroads. For more than 50 years prior to the enactment of section 15 (5) and since its enactment, usage and physical conditions combined to end transportation on direct shipments of livestock at the unloading pens. The packers, including complainant and intervener, not only acquiesced in the usage and practice but, in addition, by their agreements with the Yard Company and their participation in the earnings of that company received from its yardage charges, by their guarantee for a limited period of earnings to the Yard Company, and by other acts hereinbefore described, have concurred in the practice and have made it their own.

In the Hygrade case the Supreme Court stated that, with respect to shipments of which the complainant took possession at the unloading pens, the transportation ended at the unloading pens. There is no difference in principle between the issue in the Hygrade case and the issue in this proceeding. The yardage charge is collected on complainant's shipments when it takes possession of the animals at the unloading pens, and in the Hygrade case it was collected on that portion of the shipments of which possession was taken at the unloading pens. With respect to such shipments, the Supreme Court stated that the obligation of the

line-haul carriers ceased when the animals were placed in the unloading pens.

We find that the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards. We further find that the yardage charges assessed by the Union Stock Yards and Transit Company of Chicago on direct shipments of livestock, as defined in this report, transported [fol. 118] to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the stockyards into which the livestock is unloaded from railroad cars, are not subject to our jurisdiction.

We further find that defendants' failure to afford egress for shipments of livestock described in the preceding paragraph free from the payment of yardage charges has not resulted and does not result in an unreasonable practice.

The complaint will be dismissed.

ALLDREDGE, Commissioner, dissenting:

In my judgment the report in this case misconstrues the opinion of the Supreme Court in Atchison, T. & S. F. Ry. Co. v. United States, 295 U. S. 193. Reliance is placed upon one statement contained therein to the effect that transportation of livestock designed to public stockyards ends upon the unloading of the stock into suitable pens. A correct construction of the opinion of the Court is, I believe, that the Court did not consider that the question of free egress from the stockyards was presented for decision, that the Court did not itself undertake to say that the transportation ended with delivery into unloading pens, and that it set aside the findings in Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co., 195 I. C. C. 553, not because they were wrong in principle, but because they were technically inadequate.

Neither am I able to find anything in the Court's opinion revealing a purpose to set aside the principles enunciated in Covington Stock-Yards Co. v. Keith, 139 U. S. 128, relied upon by us in Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co., supra, and likewise specifically applicable to the facts and circumstances disclosed in the instant proceeding. It was there said (pages 135-136):

A carrier of livestock has no more right to make a special charge for merely receiving or merely delivering such stock,

in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

[fol. 119] Consistent with the principles set forth in the foregoing excerpt from the opinion of the Court I think we should here find that defendants' transportation obligations do not end with delivery of the stock into unloading pens, and that it is their duty under the law to afford through their agent, the stockyard company, access to the property of the latter for removal of their livestock therefrom, within a reasonable time after it has been placed in unloading pens, and without the payment of any special toll or charge, and that the transportation does not end until the obligations above set forth have been fulfilled.

Chairman Eastman and Commissioner Aitchison did not participate in the disposition of this case.

[fol. 120] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 179 to 198, inclusive, contain a true copy of a decision of the Interstate Commerce Commission decided April 8, 1940, in Number 27862, Swift & Company et al. v. Alton Railroad

Company, et al., as the same appears on pages 31 to 59 inclusive of the Petition of Plaintiff Appellant for Rehearing and Motion for order remanding the cause to the Lower Court for Trial, etc., filed in this Court on April 19, 1940, and which was not included in the record prepared by the Clerk of this Court for use in connection with a petition for a writ of certiorari in the case of Cause No. 7030, Armour & Company, a corporation, Plaintiff-Appellant, vs. The Alton Railroad Company, a corporation, et al., Defendants-Appellees, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifth day of September, A. D. 1940.

Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit. (Seal.)

[fol. 121] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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